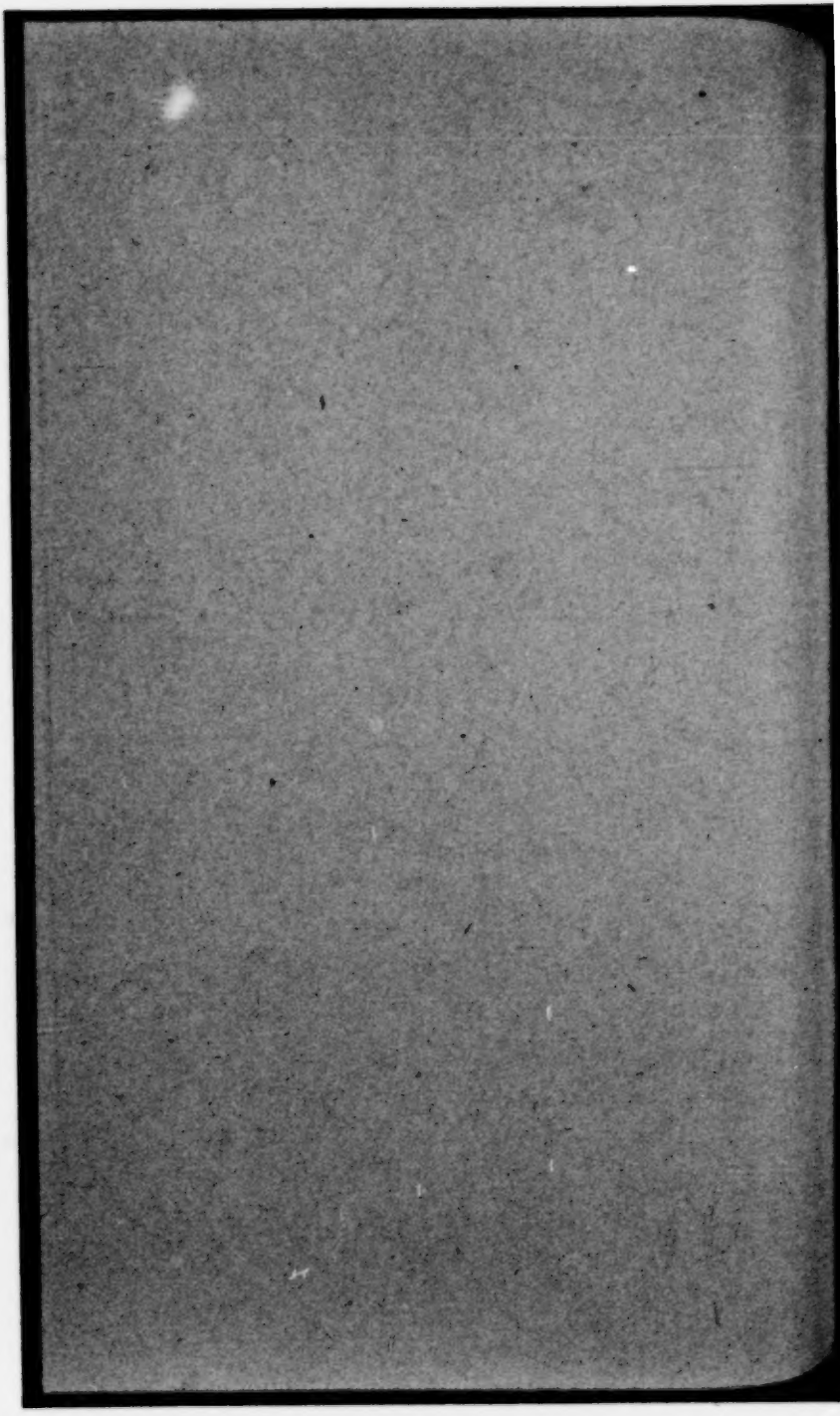


(27,750)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 393.

EDWIN G. MERRILL, JAMES SPEYER, AND FRANK A. VANDERLIP, INDIVIDUALLY AND AS TRUSTEES, &c., PLAINTIFFS IN ERROR,

vs.

FRANCIS P. GARVAN, AS ALIEN PROPERTY CUSTODIAN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the district court of the United States for the southern district of New York	1	1
Statement	1	1
Libel	2	2
Exhibit A—Schedule of bonds, etc., libeled	7	4
Exhibit B—Copy of Alien Property Custodian's demand for property	7	4
Order of service	10	6
Order of attachment	12	7
Marshal's return	14	8
Monition and return	14*a*	8
Claim of Edwin G. Merrill, James Speyer, and Frank A. Vanderlip, as trustees	15	9
Answer	17	10
Exhibit A—Statement of Massachusetts laws	29	16

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 21, 1920.

Exhibit B—Copy of trust deed, Allianz Insurance Company to James Speyer and others	31	18
Notice of motion for judgment on the pleadings	41	23
Opinion of A. N. Hand, J.	43	24
Final decree	45	25
Notice of appeal	47	26
Assignments of error	48	27
Stipulation as to record on appeal	56	31
Clerk's certificate	57	31
Opinion	58	32
Decree	66	37
Petition for writ of error	68	38
Order allowing writ of error	71	39
Assignment of errors	73	40
Bond on writ of error	81	44
Clerk's certificate	83	46
Writ of error	84	47
Citation and service	87	48

a United States Circuit Court of Appeals for the Second Circuit.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

vs.

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE RAILroad Company First Mortgage 4½% Bonds, Maturing in 1941; and Other Property; Edwin G. Merrill, James Speyer and Frank A. Vanderlip, Individually and as Trustees under a Deed of Trust Made by the Allianz Insurance Company, Claimants and Appellants.

Transcript of Record.

Appeal from the District Court of the United States for the Southern District of New York.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Dec. 1, 1919. William Parkin, Clerk.

1 District Court of United States for the Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

against

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE Railroad Company First Mortgage 4½% Bonds, Maturing in 1941, and Other Property; Edwin G. Merrill, James Speyer, and Frank A. Vanderlip, Individually and as Trustees under a Deed of Trust Made by the Allianz Insurance Company, Claimants and Appellants.

Statement.

1919.
June 26. Libel filed.
June 30. Bonds and other property seized by Marshal.
July 10. Claim filed.
Aug. 11. Answer filed.
Aug. 14. Motion for judgment on the pleadings argued before A. N. Hand, J.
Sept. 11. Motion decided in favor of libellant.
Oct. 2. Final decree filed.
Oct. 22. Notice of appeal filed.
Oct. 22. Assignment of errors filed.

Libel.

2 In the District Court of the United States for the Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant,

vs.

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE Railroad Company First Mortgage 4½% Bonds, Maturing in 1941, and Other Property.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

Francis P. Garvan, as Alien Property Custodian, brings this proceeding, being in the nature of a libel of information, against the following-described property, to-wit: $100,000 par value St. Paul & Kansas City Short Line Railroad Company, First Mortgage 4½% Bonds, maturing in 1941, and other property, a list of which is annexed hereto as Exhibit A; and says:

I.

That your petitioner is the Alien Property Custodian of the United States, duly appointed, qualified and acting as such on and since March 4, 1919, pursuant to the provisions of the Act of Congress approved October 6, 1917, known as the "Trading with the Enemy Act," and the amendments thereto, and the executive orders and proclamations issued thereunder; and that your petitioner on said 4th day of March, 1919, succeeded A. Mitchell Palmer,

3 who had previously been duly appointed, qualified and acting as such Alien Property Custodian, and who resigned such office on said 4th day of March, 1919.

II.

That your petitioner acting as such Alien Property Custodian, pursuant to the authority vested in him as such official, did heretofore on, to-wit: April 21, 1919, after investigation, determine that the Allianz Insurance Company, whose principal home office and address is Berlin, Germany, was an enemy not holding a license granted by the President within the purview of said act, proclamations and executive orders; and that the following-described property, to-wit:

$100,000 par value St. Paul & Kansas City Short Line Railroad Company, First Mortgage 4½% Bonds, maturing in 1941, and other property, more particularly described and listed in schedule attached hereto as Exhibit A, and made a part hereof as fully as

though written herein, belonging to and was held for, by, on account of, and for the benefit of, said Allianz Insurance Company.

III.

That on, to-wit: April 21, 1919, subsequent to said investigation and determination, as aforesaid, your petitioner as such Alien Property Custodian, and by virtue of the authority vested in him as such official, did require of Central Union Trust Company a New York corporation, in whose possession or under whose con-
4 trol said property then was, that said property be by it transferred, assigned, delivered, and paid over to your petitioner as such Alien Property Custodian, to be by him held, administered and accounted for as provided by law.

IV.

That said requirement and demand was duly served upon said Central Union Trust Company on, to-wit: April 24, 1919; and a true and correct copy thereof, as served upon said company, marked Exhibit B, is attached hereto and made a part hereof.

V.

That said requirement and demand has not been complied with; and that said property at the present time is in the custody of, or under the control of, said Central Union Trust Company within the Southern District of New York, and within the jurisdiction of this Court.

VI.

That for a statement of grounds upon which the jurisdiction of this court depends, your petitioner says that this is a proceeding in the nature of a libel of information, brought under Section 17 of the said "Trading with the Enemy Act", as amended, by virtue of which this court has jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises
5 to enforce the provisions of said Act.

VII.

That all and singular the premises are true and within the jurisdiction of this court.

Wherefore, your petitioner prays that this Court make and enter an order directing the Marshal of the Southern District of New York forthwith to seize and take possession of the said money and other property described above in Paragraph II hereof, and hold the same until further order of this Court; and that this Court make and enter an order requiring and citing all persons having or pretending to have any claim to the possession of said money or other property

above described, to appear at a time and place to be fixed in said order, then and there to show cause, if any they have, why the possession of said money and other property should not be delivered by the Marshal to your petitioner to be by your petitioner held, administered and accounted for as Alien Property Custodian in accordance with the provisions of said "Trading with the Enemy Act" as amended, and the Executive Orders and Proclamations issued thereunder; and your petitioner prays for all other relief to which in the premises he may be entitled and for all orders and decrees necessary to secure for your petitioner such relief.

[SEAL.] FRANCIS P. GARVAN,
As Alien Property Custodian.

6 DISTRICT OF COLUMBIA,
City of Washington, ss:

Francis P. Garvan, being duly sworn, says on oath that he is the Alien Property Custodian of the United States and the libellant in the above-entitled proceeding; that he has read the foregoing libel and knows the contents thereof, and that the same are true except as to such portions as are alleged on information and belief and as to these is informed and believes the same to be true.

[SEAL.] FRANCIS P. GARVAN.

Subscribed and sworn to before me this 21st day of June, 1919.

[SEAL.] ALVIN G. BELT,
Notary Public, District of Columbia

Term expires Jan., 1921.

7 EXHIBIT A.

Schedule.

St. Paul & Kansas City Short Line R. R. Co., First Mortgage 4½% Bonds, due 1941	$100,000
Baltimore and Ohio R. R. Company (Pittsburgh, Lake Erie and West Virginia System) 4% Bonds due 1941	80,000
Illinois Central Railroad Company and Chicago, St. Louis and New Orleans R. R. Company 5% Bonds, due 1963	50,000
Lehigh Valley R. R. Co., General Construction Mortgage Gold Bonds, 4½% due 2003	25,000

EXHIBIT B.

Trust 1-607.

Alien Property Custodian.

Demand for Property.

To Central Union Trust Company, as Trustee, New York City:

I, Francis P. Garvan, Alien Property Custodian, duly appointed, qualified and acting under the provisions of the Act of Congress

known as the "Trading with the Enemy Act" approved October 6, 1917, and the amendments thereto and the Proclamations and Executive Orders issued pursuant thereto, after investigation,
8 have determined heretofore and do hereby determine that the following property, to wit:

All of that property particularly described, itemized and listed upon and by schedule attached hereto marked Exhibit A, each page of which is identified by the signature Thos. H. Phillips on the margin thereof.

Belongs to and is by you owing to and is by you held for, by, on account of and for the benefit of Allianz Insurance Company, which Company (whose principal Home Office and address is Berlin, Germany), I, as such Alien Property Custodian, after investigation have determined heretofore and do determine hereby to be an enemy not holding a license granted by the President within the purview of said Act, Proclamations and Executive Orders.

As such Alien Property Custodian I do seize such property and do require of you that the said property shall be transferred, assigned and delivered and paid over to me as Alien Property Custodian to be by me held, administered and accounted for as provided by law.

You are further authorized and directed to make the delivery and payment of such property to the New York Trust Company of New York City (or to its order) as Liquidator and Depositary for me under and by virtue of power of authority heretofore granted to said New York Trust Company.

This demand is supplementary to that certain demand with respect to the above described property heretofore issued by me on the 18th day of November, 1918.

9 Witness my hand and seal of office this 21st day of April, 1919.

(Sgd.) FRANCIS P. GARVAN.
Alien Property Custodian.

Witness:
(Sgd.) J. A. LODER.

[SEAL.]

Referred for signature. Division of Insurance.
THOS. H. PHILLIPS,
For Chief.

Approved. Bureau of Law.
FRANCIS GOERTNER.

4/21/19

St. Paul & Kansas City Short Line R. R. Co., First Mortgage 4½% Bonds due 1941	$100,000
Baltimore and Ohio R. R. Company (Pittsburgh, Lake Erie and West Virginia System) 4% Bonds due 1941	80,000
Illinois Central Railroad Company and Chicago, St. Louis and New Orleans R. R. Company 5% Bonds due 1963	50,000
Lehigh Valley R. R. Co., General Construction Mortgage Gold Bonds, 4½% due 2003	27,000
	$257,000

10 *Order of Service.*

In the District Court of the United States for the Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant,

vs.

$160,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE RAILROAD COMPANY FIRST MORTGAGE 4½% BONDS, MATURING IN 1941, and Other Property.

In this cause it appearing that Francis P. Garvan, as Alien Property Custodian, has instituted a proceeding in the nature of a libel of information against certain money or other property now situated and being within the Southern District of New York, and within the jurisdiction of this Court; and it appearing that said action is brought under Section 17 of the Act of Congress known as the "Trading with the Enemy Act," as amended; and Francis G. Caffey, United States Attorney for the Southern District of New York, and proctor for libellant, having appeared and requested that this Court make and enter an order in aid of process in this cause, it is

Ordered that the Marshal of the Southern District of New York forthwith seize and take into possession the property described in the libel, which is $160,000 par value St. Paul & Kansas City Short Line Railroad Company First Mortgage 4½% Bonds, maturing in 1941, and other property, more particularly described and
11 itemized in the schedule attached to said libel as Exhibit A. It is further

Ordered that said Marshal shall upon taking possession of said property serve upon Central Union Trust Company, a New York Corporation, a true copy of the libel filed in this cause, and of this order in aid of process. It is further ordered that the Marshal give notice of the seizure of said property by advertisement three times a week for two successive weeks in the New York Times, a newspaper published in said Southern District of New York. It is further

Ordered that all persons having or pretending to have any claim to possession of said property, or any part or parcel thereof, appear at a term of this Court to be held at the United States Courts in the Post Office Building, Borough of Manhattan, New York City, on the 16th day of July, 1919, at 10:30 o'clock A. M., or as soon thereafter as counsel can be heard, then and there to show cause, if any they have, why the possession of said property should not be delivered by the Marshal to the libellant, to be by him as Alien Property Custodian held, administered and accounted for according to law. It is further

Ordered that the clerk of this Court issue process accordingly.

JNO. C. KNOX,
United States District Judge.

12 *Order of Attachment.*

SOUTHERN DISTRICT OF NEW YORK, ss:

The President of the United States of America to the Marshal of the Southern District of New York, Greeting:

Whereas a libel in rem and personam hath been filed in the District Court of the United States for the Southern District of New York, on the 26th day of June, in the year of our Lord one thousand nine hundred and nineteen, by Francis P. Garvan, as Alien Property Custodian, Libellant, against

St. Paul & Kansas City Short Line R. R. Co., First Mortgage 4½% Bonds, due 1941	$100,000
Baltimore and Ohio R. R. Company (Pittsburgh, Lake Erie and West Virginia System) 4% Bonds, due 1941	80,000
Illinois Central Railroad Company and Chicago, St. Louis and New Orleans R. R. Company, 5% Bonds, due 1963	50,000
Lehigh Valley R. R. Co., General Construction Mortgage Gold Bonds, 4½%, due 2003	25,000

for the reasons and causes in the said libel mentioned, and praying process; and monition of the said Court in that behalf to be made, and that all persons interested in the said property, &c., may be cited in general and special to answer the premises, and all proceedings being had that the said property, &c., may for the
13 causes in the said libel mentioned, be conveyed, transferred, assigned, delivered or paid over to the libellant, to be by him held, administered and accounted for as Alien Property Custodian in accordance with the provisions of law.

You Are Therefore Hereby Commanded to attach the said property, &c., and to detain the same in your custody until further order of the Court, respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to

say why the same should not be conveyed, transferred, assigned, delivered or paid over, pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held in and for the Southern District of New York, on the 16th day of July, 1919, at 10:30 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And we do hereby further empower, and strictly charge and command you, the said Marshal, that you cite and admonish the said respondent if it shall be found in your District, that it be and appear before the said District Court, on the 16th day of July, 1919, at 10:30 A. M., at the U. S. Court Rooms in the U. S. Court House and Post Office Building, Borough of Manhattan, City of New York, then and — to answer the said libel, and to make its allegations in that behalf and have you then and there this writ, with your return thereon.

Witness, the Hon. Learned Hand, Judge of said Court, this 26th day of June, in the year of our Lord one thousand nine hun-
14 dred and nineteen, and of our Independence the one hundred and forty-third.

ALEX. GILCHRIST, JR.,
Clerk.

FRANCIS G. CAFFEY,
Proctor for Libellant.

Marshal's Return.

I Hereby Certify, That on the 30th day of June, 1919, at the City of New York, in my district, I personally served the within order upon the within named Central Union Trust Co. by exhibiting to Benjamin A. Morton, as Vice-President of said Trust Co. at No. 80 Wall St., N. Y. C., the within original and at the same time leaving with him a certified copy thereof.

THOMAS D. McCARTHY,
United States Marshal, Southern District of New York.

Dated July 16, 1919.

14*a* *Monition.*

It is hereby stipulated that a Monition properly describing the property mentioned in the libel was duly issued and was duly served and published pursuant to law and to the order of service herein, and that the Marshal made his return thereof as follows:

Marshal's Return on Monition.

In obedience to the within Monition I attached the bonds and securities therein described on June 30, 1919, in the hands of Central Union Trust Co., at No. 80 Broadway, New York City, by exhibiting to Benjamin A. Morton, Vice-President of the Central Union Trust

Co., the within original and at the same time leaving with him a certified copy thereof and at the same time and place left with him a certified copy of Libel in this suit and have given due notice as appears by proof of publication hereto annexed to all persons claiming the same that this court will on the 16th day of July, 1919, inst. (if that day shall be a day of jurisdiction, if not on the next day of jurisdiction thereafter) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

The securities named herein were placed in my Special Deposit Account at Chatham & Phoenix National Bank, No. 149 Broadway, New York City.

Dated, New York, July 16, 1919.

THOMAS D. McCARTHY,
U. S. Marshal, S. D. N. Y.

Dated, Nov. 28, 1919.

MILLER, KING, LANE & TRAFFORD,
Proctors for Claimant-Appellant.
FRANCIS G. CAFFEY,
Proctor for Libellant-Appellee.

15 *Notice of Claim.*

In the District Court of the United States for the Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant,

vs.

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE RAILROAD COMPANY FIRST MORTGAGE 4½% BONDS, MATURING IN 1941, and Other Property.

And now, Edwin G. Merrill, one of the owners of the said $100,000 par value St. Paul & Kansas City Short Line Railroad Company, First Mortgage 4½% Bonds, maturing in 1941, and other property more fully described in Exhibit A annexed to the libel herein, intervening for the interest of himself, James Speyer and Frank A. Vanderlip, as co-trustees and joint owners of the said bonds and other property, appears before this Honorable Court and makes claim to the said bonds and other property as the same are attached by the Marshal under process of this Court, at the instance of Francis P. Garvan, as Alien Property Custodian, and the said Edwin G. Merrill avers that he, and his co-trustees, as joint owners, were in the possession of the said bonds and other property at the time of the attachment thereof, and that he and James Speyer and Frank A. Vanderlip are the true and bona fide owners of the said bonds and other property and that no other person is the owner thereof.

16 Wherefore they pray to defend accordingly.

EDWIN G. MERRILL.

Sworn to and subscribed this 11th day of July, 1919, before me.
[SEAL.] JEROME H. KNOWLES,
Notary Public.

My commission expires June 20, 1925.

MILLER, KING, LANE & TRAFFORD,
Proctors for Claimants.

Office and P. O. Address, 80 Broadway, Borough of Manhattan, New York City.

STATE OF MAINE,
County of Hancock, ss:

Edwin G. Merrill, being duly sworn, says that he is a co-trustee of James Speyer and Frank A. Vanderlip, acting under a certain deed of trust dated April 28, 1911, executed and delivered by the Allianz Insurance Company, Ltd., a German corporation, under which deed of trust the bonds and other property against which this suit has been commenced were held by him and his said co-trustees for the benefit of policyholders and creditors of said corporation in the United States; that for the purposes of this suit deponent is duly authorized by his said co-trustees to put in this claim.

EDWIN G. MERRILL.

Sworn to before me this 11th day of July, 1919.
[SEAL.] JEROME H. KNOWLES,
Notary Public.

My commission expires June 26, 1925.

17 *Answer.*

In the District Court of the United States for the Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant,

against

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE RAILROAD COMPANY FIRST MORTGAGE 4½% BONDS, MATURING IN 1941, and Other Property.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

Edwin G. Merrill, James Speyer and Frank A. Vanderlip, as trustees under a certain trust deed hereinafter described, owners and claimants of the $100,000 par value St. Paul & Kansas City Short Line Railroad Company First Mortgage 4½% bonds maturing in 1941 and the other property proceeded against by Francis P. Garvan, as Alien Property Custodian in this proceeding, answer said libel of information and complaint as follows:

1. These claimants admits that the petitioner is the Alien Property Custodian of the United States duly appointed, qualified and acting as such on and since March 4, 1919, pursuant to the provisions of the Act of Congress approved October 6, 1917, known as the "Trading with the Enemy Act," and the amendments thereto
18 and the executive orders and proclamations issued thereunder; and claimants admit that the said petitioner on said 4th day of March, 1919, succeeded A. Mitchell Palmer who had previously been duly appointed and had qualified and acted as such Alien Property Custodian, and resigned such office on said March 4, 1919.

Further answering the paragraph marked I of the libel of information, these claimants deny that those acts of the petitioner and of said A. Mitchell Palmer, his predecessor, which related to the property libeled in this proceeding were pursuant to the provisions of said Act of Congress and the amendments thereto and the executive orders and proclamations issued thereunder, but allege, on the contrary, that the said acts were outside of and in abuse of the authority thus conferred upon the petitioner and his predecessor.

2. These claimants admit that the said petitioner made his determination specified in paragraph II of the said libel of information; but deny that such determination was made pursuant to the authority vested in him as Alien Property Custodian; they allege, upon information and belief, that the only facts or documents in any way bearing on the ownership of the property libeled herein are those hereinafter set forth in paragraphs 7 to 16 inclusive of this answer, and they deny that the determination that the $100,000 par value St. Paul & Kansas City Short Line Railroad Company First Mortgage 4½% bonds maturing in 1941 and other property more particularly described and listed in the schedule attached to the said libel marked Exhibit A belonged to or were held for, by or on account of, or for the benefit of the Allianz Insurance Company,
19 was made after investigation except the ascertainment of the facts hereinabove specified.

3. These claimants admit that Central Union Trust Company of New York is a New York corporation, and that the property above described was in its possession or under its control on April 21, 1919, but, except as thus admitted, it denies the allegations contained in paragraph III of said libel of information.

4. These claimants admit that on or about April 24, 1919, the said Central Union Trust Company of New York received a communication, a copy of which is attached to the libel herein marked Exhibit B, as alleged in paragraph IV of said libel of information.

5. These claimants admit that the said requirement and demand to deliver the securities libeled herein has not been complid with. It admits that on the 30th day of June, 1919, the said property was in the custody of said Central Union Trust Company of New York within the Southern District of New York, but allege that the said

property was on the 30th day of June, 1919, seized by the Marshal of the Southern District of New York acting under alleged process herein and removed from the custody and possession of said Trust Company, and has not been returned to it or to these claimants.

6. Except as hereinabove admitted, these claimants deny the allegation contained in the paragraph marked VII of said libel that all and singular the premises are true.

20 These claimants further answering allege:

7. That by the laws of Massachusetts and, upon information and belief, by the laws of other States in this country, in which the Allianz Insurance Company (hereinafter referred to) has transacted the business of insurance, the total amount of the liabilities which a foreign insurance company may incur, and the maximum amount of the several policies of insurance which it may write, are determined by the amount of its assets immediately available in this country to meet the claims of its creditors and policyholders in this country, and that the amount of said assets is considered to be the total of the amount deposited by such a foreign insurance company in the Insurance Departments of the several States of this country, together with the property transferred by such a foreign insurance company to trustees who are residents of the United States to be held in trust primarily to meet the claims of such policyholders and creditors.

That a statement of the material laws of the State of Massachusetts in force at all the times hereinafter mentioned is hereto annexed, marked A and made a part of this answer.

8. That on or about the 28th day of April, 1911, the Allianz Insurance Company, a corporation organized under the laws of Germany (hereafter sometimes referred to as the "Insurance Company") which on or before said date had commenced to transact insurance business in the States of Massachusetts and New York, made, executed and delivered a deed of trust dated said 28th day of April,
21 1911, by which it appointed Edwin G. Merrill, James Speyer and Frank A. Vanderlip trustees for the purposes and upon the trusts, covenants and agreements therein stated, substantially as follows: To receive, hold, possess and preserve, so much of the property of said Insurance Company as might be necessary to maintain unimpaired the sums deposited with the Insurance Departments of the States of Massachusetts and New York as a deposit capital, as required by the laws of said States, over and above all the liabilities of said Insurance Company arising out of its business in the United States; with power (upon consent of said Company) to invest and reinvest said property, and to that end to make all necessary sales, conveyances, etc.; to use and appropriate the said property for the purposes mentioned in the Insurance Laws of Massachusetts and New York hereinabove referred to, (in other words for the benefit of all the policyholders and creditors of said Company in the United States); with power to said trustees if at any time the debts and lia-

bilities for the security of which the trust was created should accrue and become due and payable by the said Insurance Company and should not be otherwise satisfied and paid, to appropriate so much of the trust property as might be necessary for the payment and satisfaction thereof, and for that purpose to sell the said property; and subject to the above trust to hold the property in trust for the said Insurance Company, upon the express agreement, however, that no portion of the funds or property held in trust as aforesaid should be returned to said Insurance Company without a certificate by the Insurance Commissioner of Massachusetts stating that the sum
22 or portion thereof therein specified is no longer needed for the purpose of said trust. That for the exact terms of said trust deed, reference is made to a copy thereof hereto annexed, marked Exhibit B and made a part of this answer.

9. That the said trustees, the claimants herein, accepted the trust created by said deed, which is now in full force and effect, and, upon information and belief, that a certified copy of said deed was thereafter filed with the Superintendent of Insurance of the State of Massachusetts.

10. That pursuant to the terms of said trust deed, the said Insurance Company assigned, transferred and conveyed to the trustees therein named certain cash and securities to be held by them pursuant to the terms of said trust deed, and that the securities proceeded against in this libel are securities which were held by these claimants pursuant to the terms of said deed.

11. That the said Insurance Company engaged in the insurance business in the State of Massachusetts and in other States of the United States including the State of New York, and entered into many agreements and contracts insuring various persons and corporations in the United States.

Upon information and belief, that the said persons and corporations thus purchasing insurance from said Insurance Company have relied upon the protection and security afforded by the said trust deed and the property held by the trustees pursuant thereto, the terms of said trust deed having been made public by the filing of a copy thereof with the Superintendent of Insurance of the
23 State of Massachusetts as aforesaid, and statements of the amount and character of said securities held by the said trustees having been furnished by the trustees to the Superintendents of Insurance of Massachusetts and New York and having been by them published in their annual reports, and having been published also by the said Insurance Company.

12. Upon information and belief, that many claims against the said Insurance Company by policyholders and creditors in the United States have accrued and are now outstanding and unpaid; that the claimants cannot state the exact amount of these claims, and that the amount thereof so far as known can be ascertained only by inspection of the books of the Company which claimants allege, upon

information and belief, are in the possession of the Alien Property Custodian.

13. Upon information and belief, that the said Insurance Company has heretofore issued a large number of policies of insurance insuring persons and corporations in the United States, but these claimants are unable to set forth the total amount of said policies for the reason that they have not access to the books and records of said Company.

14. That prior to October 28, 1918, A. Mitchell Palmer was duly appointed Alien Property Custodian under the provisions of the Act of Congress entitled "Trading with the Enemy Act", approved October 6, 1917, and the amendments thereto and the executive orders and proclamations issued pursuant thereto, and duly qualified and acted as such Alien Property Custodian.

That on or about April 24, 1919, the petitioner herein served upon these claimants a paper by which he purported to seize
24 and demand the payment, assignment and delivery of all the property held in trust by them as aforesaid, including the property described in the libel of information herein. A copy of said demand is annexed to the libel herein, marked Exhibit A, and is made a part of this answer.

15. That Francis P. Garvan, the petitioner in this proceeding was duly appointed Alien Property Custodian of the United States on or about March 4, 1919, under the provisions of the aforesaid Act of Congress and the amendments thereto and the executive orders and proclamations issued pursuant thereto, succeeding the said A. Mitchell Palmer, and since said date has acted as such Alien Property Custodian. That on June 30, 1919, the United States Marshal acting under a warrant issued by this court upon the petition of said Alien Property Custodian in this proceeding, seized from these claimants, the trustees, all the property described in the libel herein, and the same is no longer in the possession of these claimants.

16. That no certificate in writing by the Insurance Commissioner of Massachusetts stating that any sum or portion of funds or property held by these claimants in trust as aforesaid is no longer needed for the purposes of said trust, has been furnished to these claimants, and, upon information and belief, that no such certificate has been signed by said Commissioner; nor has any other competent evidence been submitted to these claimants that the said funds and property held by them in trust are no longer needed for the purposes of said trust.

25 17. That the securities libeled herein are not any money or property owing or belonging to or held for, by, or on account of, or on behalf of, or for the benefit of an enemy or an ally of enemy. That the only facts or documents in any way bearing upon the ownership of the property libeled herein are the facts hereinbefore set forth in paragraphs 7 to 16 inclusive of this answer and more especially the said trust deed ("B" hereto annexed)

Upon information and belief, that the Alien Property Custodian in making the determination hereinbefore referred to that the property libeled is that of the said foreign Insurance Company, made no investigation except as to ascertain the facts hereinabove (paragraphs 7 to 16 inclusive) specified. That the question of the ownership of the said property, if there be a question, is one of law, and that the Alien Property Custodian in making the determination aforesaid acted arbitrarily and in excess of his authority.

18. That the securities herein libeled are trust funds and that all the interests therein are equitable in their nature. That the amount of the claims in respect of said funds cannot be ascertained, and the respective rights and interests therein cannot be ascertained, and the trustees cannot be discharged or protected in the administration of said funds except by the decree of a court of equity in a suit for a judicial settlement of their accounts as such trustees and for their discharge.

19. That the claimants, as trustees as aforesaid, are entitled to compensation for their services as such trustees. That in addition to the services which they have rendered incident to the management of said trust funds in the manner contemplated in and provided by said trust deed, they have been obliged to, and have actually performed additional services not contemplated therein owing to the demands of the said Alien Property Custodian and owing to the threatened and actual seizure of said securities. That such additional services have necessitated the constant care and attention of the claimants to the business of said trust estate and have necessitated the employment of counsel and the incurring of expenses in and about the management of the said trust estate, and that they will be obliged to incur further expenses for counsel fees and disbursements in connection with the defense of this proceeding. That the amount of such expenses cannot be stated at this time, the amounts thereof being unknown to the claimants.

That the amount representing the reasonable compensation of the claimants for their services as such trustees and the amount of the expenses which they have incurred and will be obliged to incur herein, are chargeable against the funds in their hands belonging to said trust estate. That in case this court should determine that said seizure was lawful and that said Alien Property Custodian is entitled to the possession of the property proceeded against herein, the amount due to the claimants for their services and expenses as trustees should be paid or allowed to them from the funds of said trust estate, or it should be adjudged that the said property is subject to the lien of the trustees therefor.

20. That all and singular the premises are true.

Wherefore these claimants pray that said libel of information may be dismissed with costs, and that the order heretofore made herein directing the Marshal of the Southern District of New York to seize and take possession of the securities mentioned in Exhibit A annexed to said libel of information be vacated, and that

the court make an order restoring the said securities to the custody of these claimants; that, if the court should determine that the Alien Property Custodian is entitled to the possession of the said property, that the amount due to these claimants for their services and expenses as trustees be paid or allowed to them by this court from the funds of said trust estate, or that it be adjudged that the said property is subject to the lien of the trustees therefor; and for such other order or relief in the premises as to the court shall seem just.

EDWIN G. MERRILL,
For Himself and for James Speyer and Frank A. Vanderlip, Claimants.
MILLER, KING, LANE & TRAFFORD,
Proctors for Claimants.

Office and P. O. Address, 80 Broadway, Borough of Manhattan, New York City.

28 STATE OF NEW YORK,
County of New York, ss:

Edwin G. Merrill, being duly sworn, says that he is one of the claimants named in the foregoing answer; that he has read the said answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

EDWIN G. MERRILL.

Sworn to before me this 11th day of August, 1919.
WILLIAM B. LOERY,
Notary Public, Richmond Co., N. Y., No. 284.

Certificate Filed in New York County Clerk's No. 2; Register's No. 10052.
Term expires March 30, 1920.

29 A.

Chapter 576 of Acts of 1907 of Massachusetts provided, among other things, as follows:

* * * * * * *

Sec. 20. No insurance company authorized to transact business in this commonwealth shall insure in a single risk, wherever such risk is located, a larger amount than one-tenth of its net assets, unless it has provided for reinsurance of the excess over said limit, to take effect simultaneously with the original contract; and if any foreign insurance company violates this provision, the insurance commissioner may revoke its authority to transact business in this commonwealth;

* * * * * * *

Sec. 84. No foreign insurance company shall be so admitted and authorized to do business until—

* * * * * * *

Second, it has satisfied the insurance commissioner

* * * * * * *

(4) that such capital and assets, other than contingent, are well invested and immediately available for the payment of losses in this commonwealth; and (5) that it insures on any single hazard an amount no larger than one-tenth of its net assets.

* * * * * * *

Sec. 85. Such foreign company, if incorporated or associated under the laws of any government or state other than the United
30 States or one of the United States, shall not be admitted until, besides complying with the conditions of the preceding section, it has made a deposit with the treasurer and receiver general or with the financial officer of some other state of the United States, of an amount not less than the capital required of like companies by sections thirty-two and thirty-four of this act. Such deposit must be in exclusive trust for the benefit and security of all the company's policy holders and creditors in the United States and may be made in the securities but subject to the limitations specified in section thirty-seven. Of such deposit an amount equal to the capital required of domestic companies by this act shall be regarded as the deposit capital and treated in the company's statement the same as the stock capital of domestic companies, but the excess of any such deposit over the amount so required as deposit capital shall not be charged to the company as a liability for deposit capital.

Sec. 86. Any admitted company of a foreign country may appoint trustees, who are citizens or corporations of the United States and approved by the insurance commissioner, to hold funds in trust for the benefit of its policy holders and creditors in the United States. Said trustees shall be named by the directors of the company, and a certified copy of the record of the appointment of such trustees and of the deed of trust shall be filed in the office of the insurance commissioner, who may examine such trustees and the assets in trust and
all books and papers relative thereto in the same manner as
31 he may examine the officers, agents, assets and affairs of insurance companies. The funds so held by such trustees, so far as the same are in securities, money or credits admissible as sound assets in the financial accounts of insurance companies, shall, with its deposits made in accordance with section eighty-five, constitute the assets of such company for the purpose of making its financial statements to the insurance commissioner.

Sec. 87. The authority of a foreign insurance company may be revoked if it violates or neglects to comply with any provision of law

obligatory upon it, and if, in the opinion of the insurance commissioner, its condition is unsound or its assets are less than its liabilities, inclusive of capital and policy liability, as computed in section eleven.

Said provisions were in force April 28, 1911, when the deed of trust referred to in this answer was made, and have remained in force down to, and including, the date of this answer.

B.

"Allianz"

Versicherungs Aktien Gesellschaft in Berlin.

This indenture made this twenty-eighth day of April in the year One thousand nine hundred and eleven, between Allianz Insurance Company, Limited, of Berlin, Germany, party of the first
32 part, and James Speyer, Frank A. Vanderlip and Edwin G. Merrill, of the City of New York and State of New York, citizens of the United States of America, Trustees, parties of the second part,

Witnesseth:

Whereas it is enacted in and by a certain Act of the Legislature of the Commonwealth of Massachusetts known as the Insurance Law, constituting Section 86 of Chapter 576, Acts of 1907 as follows, to wit:

"Any admitted company of a foreign country may appoint trustees, who are citizens or corporations of the United States and approved by the insurance commissioner, to hold funds in trust for the benefit of its policyholders and creditors in the United States. Said trustees shall be named by the directors of the company, and a certified copy of the record of the appointment of such trustees and of the deed of trust shall be filed in the office of the insurance commissioner, who may examine such trustees and the assets in trust and all books and papers relative thereto in the same manner as he may examine the officers, agents, assets and affairs of insurance companies. The funds so held by such trustees, so far as the same are in securities, money or credits admissible as sound assets in the financial accounts of insurance companies, shall, with its deposits made in accordance with section eighty-five, constitute the assets of such company for the purpose of making its financial statements to the insurance commissioner;"

and

33 Whereas the said party of the first part is a foreign insurance corporation organized and existing under the laws of the Empire of Germany and carrying on the business of insurance in the States of New York and Massachusetts in the United States aforesaid, and is desirous of obtaining the benefits of the aforesaid statute.

Now therefore know all men by these presents, that the said party

of the first part doth hereby constitute and appoint the said James Speyer, Frank A. Vanderlip and Edwin G. Merrill and their successors, to be appointed in the manner hereinafter provided, Trustees for the purposes hereinafter stated and upon the trusts, covenants, agreements and provisions hereinafter declared and set forth:

First. To receive hold possess and preserve so much of the assets and property of every kind and description of the said party of the first part as shall be necessary and sufficient to maintain unimpaired the sums deposited by it with the Superintendent of the Insurance Department at Albany, New York, and with the Treasurer and Receiver-General of the Commonwealth of Massachusetts, as a deposit capital as required by the laws of said States over and above all other liabilities of said party of the first part arising out of its business within the United States the same to be held used and appropriated to and for the purposes in said laws specified and subject thereto to be held in trust for the said party of the first part.

Provided that no portion of the said funds or property
34 so held by the said parties of the second part shall be by them returned to the said party of the first part unless a certificate in writing be first signed by the Insurance Commissioner of the Commonwealth of Massachusetts stating that a sum or portion thereof therein specified is no longer needed for the purposes of said trust.

Second. The said trustees parties of the second part shall give proper receipts and vouchers to the party of the first part for all the property, so from time to time delivered by the party of the first part to the parties of the second part, and the said parties of the second part shall keep a full and accurate record inventory and account of the said property so received and all their transactions in relation to the same which record, inventory, and account shall at all times be open to the inspection of the party of the first part its duly authorized Agent or Agents and to the proper officials of said States and the said parties of the second part shall from time to time as they may be required render true full and just accounts of the business of the said trust.

Third. The said trustees shall have power (with the previous consent of the parties of the first part signified in writing under the hand of its Chairman, Secretary, or Manager) to invest and reinvest from time to time the property so as aforesaid delivered in trust—and to this end they shall have power (with such consent as aforesaid) to make all necessary sales, conveyances, assignments, and transfers, and no purchaser shall be obliged to see to the application of the purchase money. It shall be the duty of the said Trustees
the said parties of the second part from time to time to make
35 such investments, reinvestments, purchases, sales conveyances and assignments as they may be requested to make by the party of the first part if such investments, reinvestments, etc., are not contrary to law.

The current interest and income of the said trust property as it

accrues and is received by the said Trustees shall be paid by them to the said party of the first part or its Agent or Agents.

Fourth. The said trustees the said parties of the second part shall from time to time when required by the party of the first part or its authorized Agent or Agents or by the proper Officials of said States make certify and deliver to them a statement containing a description and the amount of the trust property held by them under the provisions of this Indenture which statement shall be executed, certified and delivered by the parties of the second part in duplicate.

Fifth. If at any time debts and liabilities for the security of which this trust is created shall accrue and become due and payable by the party of the first part and shall not be otherwise satisfied and paid by the said party of the first part the said parties of the second part shall have power to appropriate so much of the said trust property as may be necessary to the payment and satisfaction thereof according to the true intent and meaning of the said act and for that purpose sell, assign and transfer the said securities without the previous consent of the party of the first part but no alleged debt, or liability, shall be so paid or satisfied unless and until the amount and validity of said alleged debt or liability in each case shall
36 have been admitted by the party of the first part and evidence thereof in writing shall have been produced to the parties of the second part or until the validity and amount thereof have been established by the claimant in due course of law, and due notice of all such payments shall be given to the proper officials of said States.

Sixth. All vacancies occurring in the trust hereby created from any cause whatsoever shall and may be filled by the nomination and appointment of a successor or successors to the said trust by the party of the first part and the Trustees so appointed upon accepting such appointment without further act or deed shall have and possess all the Estates rights and powers conferred on the said Trustees respectively named in this instrument in and by the provisions thereof. And shall be subject to all the duties imposed upon such Trustees respectively.

Seventh. The said trustees parties of the second part and their successors or any of them may at any time resign this trust and the vacancy created by every such resignation shall and may be filled by the party of the first part in the manner provided above. And the party of the first part shall have power at any time and from time to time without assigning any cause therefor to remove any one or more of the said trustees or their successors by notice of such removal in writing and witnessed by the seal of the said corporation and thereupon the party of the first part shall and may at any time or times thereafter appoint a successor to the said trustee or trustees
so removed. The same to be satisfactory to and approved
37 by said commissioner.

Provided, That immediate written notice of any and all changes in the persons comprising the said trustees parties of the second part be given to the insurance commissioner or Insurance Departments of the said States.

Eighth. These said trustees and their successors shall be liable respectively for their own neglect or misfeasance and not for the neglect or misfeasance of each other.

Ninth. The said trustees parties of the second part hereby accept the trust above created and declared upon the Terms above expressed and signify such acceptance by joining in the execution of these presents.

In witness whereof said Allianz Insurance Company, Limited, has caused the common seal of the company to be hereunto affixed and these presents to be signed by its President and the said persons parties of the second part have hereunto set their hands and seals the 28th of April, 1911.

"ALLIANZ" VERSICHERUNGS-AKTIEN-GESELLSCHAFT.

(Signed) VON DER NAHMER, *President.*
(Signed) JAMES SPEYER, *Trustee.*
(Signed) F. A. VANDERLIP, *Trustee.*
(Signed) EDWIN G. MERRILL, *Trustee.*

28 CITY & COUNTY OF NEW YORK,
State of New York, ss:

I, W. D. Despard, a Notary Public in and for the County of New York, State of New York, dwelling in the Borough of Manhattan in the City of New York aforesaid, duly commissioned and sworn, do hereby certify that I am well acquainted with the German language, and that the following is a full, true and correct translation of the written and printed words in that language on the sheet to which this translation is attached, namely:

I hereby attest the signature of Mr. Paul von der Nahmer of Nos. 1 & 2 Tauben Strasse, Berlin, which is appended to the corporate title of the Allianz Versicherungs Aktien Gesellschaft, he being duly authorized and entitled to act on behalf of the said corporation as evidenced by entry No. 866 in Section B. of the Register of Commerce in the Royal District Court in Berlin.

Berlin, 29th April, 1911.

(Signed) DR. KAYSER,
Counsellor at Law.

Officially appointed substitute of the Notary Boehlau in the District of the Royal Supreme Court of Judicature, Number 310 in the Registry of Notaries for 1911.

The foregoing signature of the officially appointed substitute of the Notary Boehlau, Counsellor at Law Kayser, is attested, with the notation that his certification is in accordance with the laws of the State.

Berlin, 1st May, 1911.

The President of the First Provincial Court,

(Signed) FABRICIUS.

39 In testimony whereof I hereunto set my hand and affix my seal of office in the City, County and State of New York aforesaid, this 17th day of May, 1911.

(Signed) W. D. DESPARD,
Notary Public, New York County, No. 33.

CONSULATE-GENERAL OF THE UNITED STATES,
City of Berlin, Empire of Germany, ss:

I, Louis G. Dreyfus, Jr., Deputy Consul-General of the United States of America at Berlin, Empire of Germany, do certify that Fabricius, whose signature is subscribed to the foregoing instrument, was, at the time of subscribing the same, President of The Royal Prussian Court of Justice I at Berlin, Empire of Germany, duly commissioned and by law authorized to execute such acts, and that his signature and official seal affixed thereto are genuine, and as such are entitled to full faith and credit.

Witness my signature and seal of office, at Berlin, Germany, this second day of May in the year 1911.

(Signed) LOUIS G. DREYFUS, JR.,
Deputy Consul-General of the United States of America at Berlin, Germany.
[SEAL.]

40 STATE OF NEW YORK,
County of New York, ss:

I, Edwin F. Corey, a Commissioner of the Commonwealth of Massachusetts, residing in the City and State of New York, do certify that on the seventeenth day of May, A. D. 1911, the foregoing named James Speyer, Frank A. Vanderlip and Edwin G. Merrill, personally appeared before me at the said City of New York in said State, and acknowledged the foregoing instrument by them signed and sealed to be their free act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal on this Seventeenth day of May in the year of our Lord One thousand nine hundred and eleven.

(Signed) EDWIN F. COREY,
Commissioner for the Commonwealth of Massachusetts, 56 Wall Street, N. Y.

41 *Notice of Motion.*

District Court of the United States for the Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant,

against

ONE HUNDRED THOUSAND DOLLARS ($100,000) PAR VALUE ST. Paul and Kansas City Short Line Railroad Company First Mortgage 4½% Bonds, Maturing in 1941, and Other Property.

SIRS:

Please take notice that on the libel, notice of claim and answer heretofore filed herein, and upon all procedings heretofore had herein, I shall move this Court at a term thereof for the hearing of motions to be held in the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 14th day of August, 1919, at the opening of Court or as soon thereafter as counsel may be heard for a decree awarding possession of the libellant as Alien Property Custodian of the property seized in this proceeding by the United States Marshal for the Southern District of New York, being the property specified in Exhibit A, attached to the libel, and awarding to the libellant herein the costs of this proceeding to be duly taxed and for such other relief as in the prem-
42 ises may seem just.

Dated, New York, August 11, 1919.

FRANCIS G. CAFFEY,
United States Attorney for the
Southern District of New York,
Proctor for Libellant.

Office and P. O. Address, U. S. Courts & Post Office Bldg., Borough of Manhattan, City of New York.

To Messrs. Miller, King, Lane & Trafford, Proctors for Claimants, Edwin G. Merrill, James Speyer and Frank A. Vanderlip.

43 *Opinion.*

United States District Court, Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libelant,

against

$20,000 PAR VALUE COLORADO & SOUTHERN FIRST MORTGAGE 4% BONDS, MATURING IN 1929, and Other Property.

FRANCIS P. GARVAN, as Alien Property Custodian, Libelant,

against

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE RAILROAD Company First Mortgage 4½% Bonds, Maturing in 1941, and Other Property.

Miller, King, Lane & Trafford, Proctors for Central Union Trust Co. of New York, as Trustee-Claimant in first proceeding; Proctors for Edwin G. Merrill et al., as Trustees-Claimants in the second proceeding.

Francis G. Caffey, United States Attorney, Proctor for Alien Property Custodian.

Spier Whitaker and Earl B. Barnes, Counsel.

AUGUSTUS N. HAND, *District Judge:*

The argument of the proctors for the trustees is persuasive, but the great difficulty which inheres in their position is their
44 practical admission that Section 8-*a* of the Trading With The Enemy Act is of no real significance. I think it must be further admitted, if their position is sound, that this section as originally proposed was of no importance. I reached the conclusion in the Munich Insurance Company case that a trust which involved practically no duties on the part of the trustee, except to hold property and pay policy-holders who have established their claims by judgment or secured the consent of the alien insurance company to payment, did not create a lien which entitled the trustee to "continue to hold" the res under the provisions of the Act. In other words, I regarded mere holding liens as leaving the ownership so far in the pledgor or settlor as to enable the Alien Property Custodian to exercise his possessory rights under Section 7-*c* of the Act. The argument that such a construction would exempt from liquidation by a trustee liens which are enforcible without notice or demand is not reasonable. All liens which can be enforced without notice or demand can be enforced equally after such notice. The greater includes the less. Nor can I see any practical difficulty which would arise from such a construction as I adopted in the Munich case while convenient administration of the enemy aliens' property would seem to favor it. The provisions

of Section 8-*a* can only thus be given any real meaning. I shall adhere to my former ruling and grant a decree to each libellant, but as the cases are not free from doubt I shall allow a stay pending an appeal, if the same is taken within twenty days.

Sept. 11, 1919.

A. N. H.,
D. J.

45 *Decree.*

At a Stated Term of the District Court of the United States of America for the Southern District of New York, Held at the United States Court and Post Office Building in the City of New York, in the said District, on the 2nd Day of October in the Year of Our Lord One Thousand Nine Hundred and Nineteen.

Present: The Honorable Augustus N. Hand, District Judge.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant,

against

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE RAILroad Company First Mortgage 4½% Bonds, Maturing in 1941, and Other Property.

This cause came on to be heard at this time and was argued by counsel and thereupon upon consideration thereof it was

Ordered, adjudged and decreed as follows, viz.:

That the libellant herein have judgment awarding to him possession of the bonds, stocks and other securities described in Exhibit "A" annexed to the libel herein, to be by him held, administered and accounted for as Alien Property Custodian;

That the United States Marshal for the Southern District of New York deliver to the libellant as Alien Property Custodian the
46 bonds, stocks and other securities described in Exhibit "A" annexed to the libel herein and heretofore seized by him;

And the libellant's costs having been duly taxed herein in the sum of Sixty-eight and 20/100 ($68.20) it is

Further ordered, adjudged and decreed that the libellant recover of the claimants, Edwin G. Merrill, James Speyer and Frank A. Vanderlip, as Trustees, and of National Surety Company, a corporation organized under the laws of the State of New York, the stipulator for costs herein, the sum of Sixty-eight and 20/100 ($68.20) as costs duly taxed and that execution issue therefor;

That unless an appeal be taken from this decree on behalf of the claimant within the time fixed by the rules of this Court, the stipulator for costs on the part of the claimant shall cause the engagement of its stipulation to be performed or show cause within four days' time why judgment and execution shall not issue against it, its goods, chattels and accounts for the satisfaction of this decree;

That all proceedings herein shall be without prejudice to the claimant or to any other persons with respect to any claims they may see fit to file with the Alien Property Custodian pursuant to Section 9 of the Trading with the Enemy Act or any suit they may see fit to institute thereunder after the filing of their claims.

AUGUSTUS N. HAND,
U. S. D. J.

47 *Notice of Appeal.*

District Court of the United States for the Southern District of New York.

(69—174)

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

against

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE RAILROAD Company First Mortgage 4½% Bonds, Maturing in 1941, and Other Property; Edwin G. Merrill, James Speyer and Frank a Vanderlip, Individually and as Trustees under a Deed of Trust Made by the Allianz Insurance Company, Claimants and Appellants.

SIRS:

Take notice that the claimants above named hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from the final decree entered herein October 2, 1919.

Dated, New York, October 22, 1919.

Yours, &c.,

MILLER, KING, LANE & TRAFFORD,
Proctors for Claimants and Appellants.

Office and P. O. Address, 80 Broadway, Borough of Manhattan, New York City.

48 To Francis G. Caffey, Esq., United States Attorney, Proctor for Libellant and Appellee.

Alexander Gilchrist, Jr., Esq., Clerk of the District Court of the United States for the Southern District of New York.

Assignments of Error.

District Court of the United States for the Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

against

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE RAILROAD Company First Mortgage 4½% Bonds, Maturing in 1941, and Other Property; Edwin G. Merrill, James Speyer and Frank A. Vanderlip, Individually and as Trustees under a Deed of Trust Made by the Allianz Insurance Company, Claimants and Appellants.

The claimants, Edwin G. Merrill, James Speyer and Frank A. Vanderlip, individually and as trustees under a deed of trust made by the Allianz Insurance Company, complain of errors in the proceedings in this case in the District Court of the United States for the Southern District of New York and in the decree rendered therein, and assign the following as the errors complained of:

49

1. The Court erred in holding that the libellant was entitled to the relief granted herein or to any relief, and in not holding that the said libel should be dismissed.

2. The Court erred in adjudging that the libellant was entitled to the possession of the property described in the libel.

3. The Court erred in adjudging that the libellant was entitled to the possession of the property described in the libel to be by him held, administered and accounted for as Alien Property Custodian.

4. The Court erred in adjudging that the United States Marshal for the Southern District of New York should deliver to the libellant the said property described in the libel.

5. The Court erred in holding that, under the provisions of the Trading with the Enemy Act, the libellant is entitled to the possession of the property described in the libel.

6. The Court erred in holding that the Trading with the Enemy Act gave to the libellant any authority or jurisdiction over the property described in said libel.

7. The Court erred in not holding that the acts of the libellant and of A. Mitchell Palmer, his predecessor as Alien Property Custodian, which related to the property libelled in this proceeding, were not done pursuant to the provisions of the Trading with the Enemy Act.

8. The Court erred in not holding that the Trading with the Enemy Act does not authorize the seizure of property of American citizens because an enemy has some right in or claim against it.

9. The Court erred in not holding that section 7 (*c*) of the Trading with the Enemy Act is the only portion of the Act which defines the property which may be seized by or shall be transferred to the Alien Property Custodian.

10. The Court erred in not holding that the only property which the Alien Property Custodian is entitled to seize is property owned by enemies and the rights and claims of enemies in or against property which is owned by American citizens or in which American citizens have the right of possession.

11. The Court erred in holding that the property described in the libel herein belongs to an enemy alien corporation.

12. The Court erred in holding that the property described in the libel was property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or an ally of enemy within the contemplation of the Trading with the Enemy Act.

13. The Court erred in holding that the ownership of the property conveyed by the trust deed to these claimants remained so far in the maker of the trust as to enable the Alien Property Custodian to exercise possessory rights under section 7 (*c*) of the Trading with the Enemy Act.

14. The Court erred in holding that under section 7 (*c*) of the Trading with the Enemy Act possessory rights in the property libelled herein were conferred upon the Alien Property Custodian.

15. The Court erred in holding that the trust created by the deed to the claimants herein involved practically no duties on the part of the trustees except to hold property and pay policy holders who have established their claims by judgment or secured the consent of the alien insurance company to payment.

16. The Court erred in holding that the right of the Trustees to apply the property libelled herein upon an admission of indebtedness by the company or after decree of the court are the rights of mere passive trustees or custodians.

17. The Court erred in holding that the rights of the trustees herein were only in the nature of a lien and to be determined by the principles applicable to liens.

18. The court erred in holding that the deed of trust herein did not create a lien which entitled the trustees, these claimants, to continue to hold the res under the provisions of the Trading with the Enemy Act.

19. The Court erred in holding that the trust deed herein created no more than a possessory lien without right on the part of the trustees to enforce it.

20. The Court erred in holding that the trustees, the claimants, herein, held the securities solely for convenience because the creditors sought to be protected are contingent and numerous.

52 20-*a*. The Court erred in holding that a right to retain possession is given only to those lienors whose business requirements naturally demanded it.

20-*b*. The Court erred in holding that the trustees herein are not of the class whose rights are preserved by the Trading with the Enemy Act and are consequently not entitled to retain possession as against the Alien Property Custodian.

20-*c*. The Court erred in not holding that the rights of these trustees and of those having a primary right as beneficiaries in the trust estate were such as to require that the trustees retain possession of the property libelled herein.

21. The Court erred in holding that the right of the trustees under the trust deed herein to hold the property conveyed to them under said trust was not covered or protected by the terms of said Section 8 (*a*).

21-*a*. The Court erred in holding that the Trading with the Enemy Act gave to the Alien Property Custodian the right to obtain possession of enemy-owned property irrespective of the existence of liens thereon, unless such liens may be disposed of on notice or presentation or demand.

22. The Court erred in holding that Section 8 (*a*) of the Trading with the Enemy Act preserved the rights and remedies of lienors only in a limited class of cases, to wit: those where the mortgage, pledge or lien or other right in the nature of security in property of an enemy or ally of enemy was one which by law or by the terms of the instrument creating such mortgage, pledge or
53 lien or right, may be disposed of on notice or presentation or demand.

23. The Court erred in holding that because the rights of the claimants herein as trustees were not expressly excepted from the operation of Section 8 (*a*) of the Trading with the Enemy Act they became subject to seizure as the property of an alien enemy.

24. The Court erred in not holding that the claimants were the owners of the legal title to the property described in the libel.

25. The Court erred in not holding that the trustees herein are not mere lienors, but the owners of the property, and that the Trading with the Enemy Act does not authorize the taking of the property libelled herein from their possession.

26. The Court erred in holding that the claimants had a mere lien upon the property described in the libel.

27. The Court erred in not holding that the claimants were entitled to continue to hold the property described in the libel until the purposes for which the trust had been created had been completed.

27-*a*. The Court erred in not holding that the claimants have a lien upon the property described in the libel for the value of their services and the amount of their expenses as trustees under the trust deed made by the Allianz Insurance Company.

28. The Court erred in not holding that the claimants are entitled to the possession of the property described in the libel for the
54 purpose of enforcing their lien thereon for the value of their services and the amount of their expenses as trustees under the trust deed made by the Allianz Insurance Company.

29. The Court erred in not holding that the claimants are entitled to retain possession of part of the property described in the libel sufficient to satisfy their claims for the value of their services and the amount of their expenses as trustees under the trust deed.

30. The Court erred in not holding that the trustees have a lien upon the fund for their compensation and the amount of their expenses, including counsel fees, and that their right to retain the libelled property in their possession to satisfy the said lien is protected by the Trading with the Enemy Act or is not interfered with by said Act.

31. The Court erred in not holding that it is the right of the trustees, the claimants herein, before the trust fund is taken from their possesion, to have their day in Court, to have cited there all persons entitled to the fund, to have their accounts examined and passed upon, and to have the amount of their expenses and compensation adjudicated and paid from the fund itself.

32. The Court erred in not holding that it is the right of the trustees to have the Court direct the distribution of the fund held by them and thereupon to discharge the trustees.

33. The Court erred herein in founding its judgment upon a construction of the Trading with the Enemy Act which deprives the claimants of their property without due process of law in
55 violation of the Constitution of the United States.

Wherefore these claimants, individually and as trustees, pray that the said decree herein be reversed; and that said United States District Court be directed to enter a decree in accordance with the prayer of the answer of these claimants, adjudging that the securities seized by the Marshal be restored to the custody of these claimants; and, if the Court should determine that the Alien Property Custodian is entitled to the possession of the said property, that the amount due to these claimants for their services and expenses as

trustees be paid or allowed to them by this Court from the funds of said trust estate, or that it be adjudged that the said property is subject to the lien of the trustees therefor; and for such other order or relief in the premises as to the Court shall seem just.

Dated, October 22, 1919.

MILLER, KING, LANE & TRAFFORD,
Proctors for Claimants.

56 *Stipulation on Appeal Record.*

United States District Court, Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

against

ONE HUNDRED THOUSAND DOLLARS ($100,000) PAR VALUE ST. Paul and Kansas City Short Line Railroad Company First Mortgage 4½% Bonds, Maturing in 1941, and Other Property; Edwin G. Merrill, James Speyer and Frank A. Vanderlip, Individually and as Trustees under a Deed of Trust Made by the Allianz Insurance Company, Claimants and Appellants.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, November 28, 1919.

MILLER, KING, LANE & TRAFFORD,
Proctors for Claimants-Appellants.
FRANCIS G. CAFFEY,
Proctor for Libellant-Appellee.

57 *Certificate of Clerk.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

against

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE RAILROAD Company First Mortgage 4½% Bonds, Maturing in 1941, and Other Property; Edwin G. Merrill, James Speyer and Frank A. Vanderlip, Individually and as Trustees under a Deed of Trust Made by the Allianz Insurance Company, Claimants and Appellants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record

of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 1st day of December, in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the said United States the one hundred and forty-fourth.

ALEX. GILCHRIST, Jr.,
Clerk.

58 United States Circuit Court of Appeals for the Second Circuit, October Term, 1919.

No. 157-158-169-170.

Argued January 23, 1920.

Decided March 3, 1920.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

vs.

$20,000 PAR VALUE COLORADO & SOUTHERN FIRST MORTGAGE 4% Bonds, Maturing in 1929, and Other Property; Central Union Trust Company of New York, Individually and as Trustee under a Deed of Trust Made by Frankfort General Insurance Company, Claimant and Appellant.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

vs.

$100,000 PAR VALUE ST. PAUL KANSAS CITY SHORT LINE RAILROAD Company First Mortgage 4½% Bonds, Maturing in
59 1941, and Other Property; Edwin G. Merrill, James Speyer and Frank A. Vanderlip, Individually and as Trustees under a Deed of Trust Made by Allianz Insurance Company, Claimants and Appellants.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant-Appellee,

vs.

$50,000 PAR VALUE UNITED STATES GOVERNMENT 4% REGISTERED Bonds, Maturing in 1925, and Other Bonds, Stocks and Other Securities; J. Markham Marshall, Walter T. Rosen, and Rudolf Metz, as Trustees, etc., Claimants-Appellants.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant-Appellee,

vs.

$25,000 PAR VALUE CHESAPEAKE & OHIO RAILWAY 4½% Convertible Bonds and Other Bonds, Stocks and Other Securities; J. Markham Marshall, Walter T. Rosen and Rudolf Metz, as Trustees, etc., Claimants-Appellants.

60 Appeals from the District Court of the United States for the Southern District of New York.

Before Ward, Hough and Manton, Circuit Judges.

Francis G. Caffey, United States Attorney for Libellant.

Perry D. Trafford for Claimants-Appellants Central Union Trust Co. and Edwin G. Merrill, et al.

Emory R. Buckner and H. H. Nordlinger for J. Markham Marshall et al., Claimants-Appellants.

WARD, *C. J.*:

Connecticut and Massachusetts require, as do almost all the states, that insurance companies of foreign nations, before doing business in the state, shall deposit funds or securities for the protection of the company's policy holders and creditors in the United States. The exact terms of the statutes need not be stated.

The Munich Re-Insurance Company, a German corporation did deposit a quantity of securities with trustees in conformity with the law of the State of Connecticut.

The Frankfort General Insurance Company and the Allianz Insurance Company, both German Companies, deposited securities with trustees in conformity with the requirements of the law of Massachusetts.

It will not be necessary to set out the terms of the trusts at length; it is enough to say that although the income of the securities is payable to the Companies and they can withdraw them or any of them upon substituting others equally good, and can change the trustees, still the trustees hold the securities in trust to pay the claim of any policy holder or creditor admitted to be due by the Company or established by the claimant in due course of law.

It is apparent that the trustees hold primarily for the benefit of the policy holders and creditors, and secondarily for the benefit of the Companies; but their duties are active, and they are not merely lien holders. The Companies cannot take the securities
61 out of their possession until the rights, absolute or contingent, of all policy holders and creditors in this country are secured, and in the meantime the trustees have the active duty of collecting and paying over the income, investing and reinvesting and paying claims properly proved.

The President, through the Secretary of the Treasury, issued licenses to the Companies in question, not to continue to do business in the United States, but for the purpose of being liquidated.

In November, 1918, the Alien Property Custodian filed libels of information in the District Court of the United States for the Southern District of New York against the securities in question, alleging his demand for the same of the trustees and their refusal, and praying the Court to order the United States Marshal to seize the same and deliver them to him to be held and applied in accordance with law.

The Court made the decrees prayed for and the securities have been seized by the Marshal and delivered to the Alien Custodian; the trustees appeal.

We have no doubt of the right of the Alien Custodian to apply to the Court for aid; if he did not know where the securities were he would evidently be entitled to the aid of the Court to compel the trustees to discover and deliver them. In this case he did know where they were, but it was much more orderly and decent to obtain possession by the aid of the Court than to seize them by violence and the strong hand. Section 17 of the Act of October 6, 1917, 40 Statutes at Large, 411, known as the Trading with the Enemy Act, gives the Court full power in the premises:

"That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in Sections one hundred
62 and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary."

The material parts of Section 7 (*c*) of the Act as amended November 4, 1918, 40 Statutes at Large, 1020, read:

"(*c*) If the President shall so require any money or other property, including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, the rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President, after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this Act." * * *

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed,

transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." * * *

The constitutionality of the Act under the war powers of
63 Congress is admitted, the dispute between the parties being as to the construction of it.

The trustees-claimants contend that the Alien Custodian can seize only property belonging wholly to alien enemies; that he stands in their shoes and can get no more than they could themselves.

On the other hand, the Alien Custodian contends that, the President having delegated his authority to him under Section 5 of the Act, he can conclusively determine what property is liable to seizure as being that of an alien enemy.

We agree with the Alien Custodian, and cannot read the perfectly plain language of 7 (c) in any other way. As all the facts were known and undisputed they amounted to an investigation by the Alien Custodian. If persons not alien enemies, or allies of alien enemies, were given no means to protect their interests in such property the seizure would be unconstitutional as without due process of law; but they are given such remedies under Section 9:

"That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file with the custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United
64 States or of the interest therein to which the President shall determine said claimant is entitled: Provided, however, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any

time before the expiration of six months after the end of the war institute a suit in equity in the Supreme Court of the District of Columbia or in the District Court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or convevance, transfer assignment, or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated * * *."

The Alien Custodian takes possession subject to the rights of innocent persons. Section 12, and amended March 28, 1918, 40 Statutes at Large, 460 provides:

65 "The Alien Property Custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: * * *"

It is obviously of the utmost importance that in time of war enemy property should be put into the possession of government; on the other hand, no great harm can come to the interests of innocent persons since the possession and management of the property by the Alien Custodian is under the control of the President by regulation and of the courts by decree. Policy holders or creditors may proceed to protect their rights under Section 9, or the trustees may do so for them.

We do not think that the trustees-claimants are mere lien holders under Section 8 of the Act and as such to be entitled to retain possession of the property in question; they are as stated above, trustees with active duties, and not lien holders within the meaning of the section at all. It clearly protects the lien holders and especially the vast amount of loans against collateral, any interference with

which would cause great injury to banks, trust companies and stock brokers, and produce disturbance of business generally.

The decrees are affirmed.

HOUGH, *C. J.* concurs in result.

66 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court Rooms, in the Post Office Building, in the City of New York, on the 13th Day of March, One Thousand Nine Hundred and Twenty.

Present: Hon. Henry G. Ward, Hon. Charles M. Hough, Hon. Martin T. Manton, Circuit Judges.

FRANCIS P. GARVAN, as Alien Property Custodian, etc., Libellant-Appellee,

v.

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE 1ST Mortgage Bonds, etc.; Edwin G. Merrill et al., Individually, etc., Claimants-Appellants.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.
C. M. H.

67 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. F. P. Garvan v. $100,000 Bonds. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 16, 1920. William Parkin, Clerk.

68 United States Circuit Court of Appeals for the Second Circuit.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

against

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE RAILroad Company First Mortgage 4½% Bonds, Maturing in 1941, and Other Property; Edwin G. Merrill, James Speyer and Frank A. Vanderlip, Individually and as Trustees under a Deed of Trust Made by the Allianz Insurance Company, Claimants and Appellants.

Petition for Writ of Error.

To the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now come the Claimants-Appellants, by their attorneys, and complain that in the record of the proceedings and also in the rendition of the order for mandate of the United States Circuit Court of Appeals for the Second Circuit, sitting in New York City, in the State of New York, in the above styled and numbered cause on the 3rd day of March, A. D. 1920, affirming the decree of the United States District Court for the Southern District of New York in said cause, a manifest error has intervened to the great damage of the petitioners; that the jurisdiction of the District Court of the United States for the Southern District of New York in the said cause did not depend upon the diversity of citizenship of the parties but depended upon the fact that it arose under the laws of the United States, and that the case did not arise under the patent laws, under the trade-mark

69 laws, under the copy-right laws, under the revenue laws, nor under the criminal laws of the United States, nor was the said case an admiralty case, nor was the cause one arising under "An Act to establish a uniform system of bankruptcy throughout the United States," nor one arising under "An Act relating to the liability of common carriers by railroad to their employees in certain cases," nor one arising under "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," nor one arising under "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," nor one arising under any amendment or supplement to any of the afore-mentioned Acts; that the amount involved in the case exceeds the sum of one thousand dollars ($1,000), besides costs, and that this is not a case where the judgment or decree of the Circuit Court of Appeals is made final.

Wherefore petitioners pray for an allowance of the writ of error to

the end that the cause may be carried to the Supreme Court of the United States, and the petitioners pray for such other process as is necessary to perfect the writ of error prayed for to the end that the error therein may be corrected.

Dated, May 24, 1920.

MILLER, KING, LANE & TRAFFORD,
Proctors for Claimants-Appellants.

Office and P. O. Address, 80 Broadway, Borough of Manhattan, New York City, N. Y.

70 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Francis P. Garvan, as Alien Property Custodian, Libellant-Appellee, against $100,000 Par Value St. Paul & Kansas City Short Line Railroad Company, etc.; Edwin G. Merrill, and others, Individually and as Trustees, etc., Claimants-Appellants. Copy. Petition for Writ of Error. Miller, King, Lane & Trafford, Proctors for Claimants-Appellants, 80 Broadway, Borough of Manhattan, New York City. Filed May 25, 1920.

71 United States Circuit Court of Appeals for the Second Circuit.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

against

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE RAILroad Company First Mortgage 4½% Bonds, Maturing in 1941, and Other Property; Edwin G. Merrill, James Speyer and Frank A. Vanderlip, Individually and as Trustees under a Deed of Trust Made by the Allianz Insurance Company, Claimants and Appellants.

Order Allowing Writ of Error.

The claimants-appellants having filed their petition for a writ of error from the Supreme Court of the United States to this Court, to review the order for mandate of this Court made and entered on March 16, 1920, it is

Ordered that the said writ of error of said claimants-appellants to review said order for mandate, be, and the same is hereby allowed; and it is

Further ordered that the claimants-appellants file a bond in the sum of two hundred & fifty dollars on or before the 26th day of May, 1920, the same to act as a bond for costs.

Dated, May 24, 1920.

H. G. WARD,
United States Circuit Judge.

72 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Francis P. Garvan, as Alien Property Custodian, Libellant-Appellee, against $100,000 Par Value St. Paul

& Kansas City Short Line Railroad Company, etc.; Edwin G. Merrill, and Others, Individually and as Trustees, etc., Claimants-Appellants. Copy. Order Allowing Writ of Error. Miller, King, Lane & Trafford, Proctors for Claimants-Appellants, 80 Broadway, Borough of Manhattan, New York City. Filed May 25, 1920.

73 District Court of the United States for the Southern District of New York.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

against

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE RAILroad Company First Mortgage 4½% Bonds, Maturing in 1941, and Other Property; Edwin G. Merrill, James Speyer and Frank A. Vanderlip, Individually and as Trustees under a Deed of Trust Made by the Allianz Insurance Company, Claimants and Appellants.

Assignment of Errors.

Now come the claimants in the above entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above entitled cause from the order for mandate of this Honorable Court made and entered on March 16th 1920.

1. The Court erred in affirming the decree of the District Court of the United States for the Southern District of New York, made and entered on October 6, 1919, granting the libellant a decree on the pleadings.

2. The Court erred in not reversing the decree of the District Court of the United States for the Southern District of New York, made and entered on October 6, 1919, granting the libellant a decree on the pleadings.

3. The Court erred in holding that the libellant was entitled to the relief granted herein or to any relief, and in not holding that the said libel should be dismissed.

74 4. The Court erred in adjudging that the libellant was entitled to the possession of the property described in the libel.

5. The Court erred in adjudging that the libellant was entitled to the possession of the property described in the libel to be by him held, administered and accounted for as Alien Property Custodian.

6. The Court erred in adjudging that the United States Marshal for the Southern District of New York should deliver to the libellant the said property described in the libel.

7. The Court erred in holding that, under the provisions of the Trading with the Enemy Act, the libellant is entitled to the possession of the property described in the libel.

8. The Court erred in holding that the Trading with the Enemy Act gave to the libellant any authority or jurisdiction over the property described in said libel.

9. The Court erred in not holding that the acts of the libellant and of A. Mitchell Palmer, his predecessor as Alien Property Custodian, which related to the property libelled in this proceeding, were not done pursuant to the provisions of the Trading with the Enemy Act.

10. The Court erred in not holding that the Trading with the Enemy Act does not authorize the seizure of property of American citizens because an enemy has some right in or claim against it.

11. The Court erred in not holding that section 7c of the Trading with the Enemy Act is the only portion of the Act which defines the property which may be seized by or shall be transferred to the Alien Property Custodian.

12. The Court erred in not holding that the only property which the Alien Property Custodian is entitled to seize is property owned by enemies and the rights and claims of enemies in or against property which is owned by American citizens or in which American citizens have the right of possession.

13. The Court erred in not holding that the claimants are the owners of the legal title to the property described in the libel.

14. The Court erred in not holding that the property described in the libel was not property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of any enemy or an ally of enemy within the contemplation of the Trading with the Enemy Act.

15. The Court erred in not holding that the property described in the libel was not property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of any enemy or an ally of enemy within the contemplation of the Trading with the Enemy Act and that said property was not liable therefore to seizure pursuant to said act.

16. The Court erred in holding that although the property described in the libel was not property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of any enemy or an ally of enemy within the contemplation of the Trading with the Enemy Act, it was nevertheless liable to seizure pursuant to said Act; and that the determination of the Alien Property Custodian that said property is liable to seizure as belonging to an alien enemy is conclusive.

76 17. The Court erred in holding that the deed of trust herein did not create a lien which entitled the trustees, these claimants, to continue to hold the res under the provisions of the Trading with the Enemy Act.

18. The Court erred in holding that the trustees herein are not of the class whose rights are preserved by the Trading with the Enemy Act and are consequently not entitled to retain possession as against the Alien Property Custodian.

19. The Court erred in not holding that the rights of these trustees and of those having a primary right as beneficiaries in the trust estate were such as to require that the trustees retain possession of the property libelled herein.

20. The Court erred in holding that the right of the trustees under the trust deed herein to hold the property conveyed to them under said trust was not covered or protected by the terms of said section 8-*a*.

21. The Court erred in holding that the Trading with the Enemy Act gave to the Alien Property Custodian the right to obtain possession of enemy owned property irrespective of the existence of liens thereon, unless such liens may be disposed of on notice or presentation or demand.

22. The Court erred in holding that section 8-*a* of the Trading with the Enemy Act preserved the rights and remedies of lienors only in a limited class of cases, to wit: those where the mortgage, pledge or lien or other right in the nature of security in property of an enemy or ally of enemy was one which by law or by the terms of the instrument creating such mortgage, pledge or lien or right, may be disposed of on notice or presentation or demand.

77 23. The Court erred in holding that because the rights of the claimants herein as trustees were not expressly excepted from the operation of section 8-*a* of the Trading with the Enemy Act they became subject to seizure.

24. The Court erred in holding that the knowledge by the libellant of all the facts was equivalent to the investigation by him required by section 7-*c* of the Trading with the Enemy Act.

25. The Court erred in not holding that the investigation contemplated by section 7-*c* of the Trading with the Enemy Act includes investigation not only of the questions of fact involved but also of the questions of law involved, and that consequently the mere fact that the libellant is alleged to have known all the pertinent facts does not establish that he has made such investigation as is contemplated by the said Act.

26. The Court erred in not holding that the investigation and determination of the libellant were void and without jurisdiction in that the said libellant had no jurisdiction of the property libelled

because it was not money or other property or right or claim of any character or description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of any enemy or ally of enemy as specified in the Trading with the Enemy Act.

27. The Court erred in not holding that the determination of the libellant was the determination solely of a question of law and therefore reviewable by the court.

28. The Court erred in not holding that the claimants were entitled to continue to hold the property described in the libel until the purposes for which the trust had been created had been completed.

78 29. The Court erred in not holding that the claimants have a lien upon the property described in the libel for the value of their services and the amount of their expenses as trustees under the trust deed made by the Allianz Insurance Company.

30. The Court erred in not holding that the claimants are entitled to the possession of the property described in the libel for the purpose of enforcing their lien thereon for the value of their services and the amount of their expenses as trustees under the trust deed made by the Allianz Insurance Company.

31. The Court erred in not holding that the claimants are entitled to retain possession of a part of the property described in the libel sufficient to satisfy their claims for the value of their services and the amount of their expenses as trustees under the trust deed.

32. The Court erred in not holding that the trustees have a lien upon the fund for their compensation and the amount of their expenses, including counsel fees, and that their right to retain the libelled property in their possession to satisfy the said lien is protected by the Trading with the Enemy Act or is not interfered with by said Act.

33. The Court erred in not holding that it is the right of the trustees, the claimants herein, before the trust fund is taken from their possession, to have their day in court, to have cited there all persons entitled to the fund, to have their accounts examined and passed upon, and to have the amount of their expenses and compensation adjudicated and paid from the fund itself.

79 34. The Court erred in not holding that it is the rights of the trustees to have the Court direct the distribution of the fund held by them and thereupon to discharge them as trustees.

35. The Court erred in refusing to hold that the Alien Property Custodian can seize only such interest in property as is vested in alien enemies; that he stands in their shoes and can take no more than they could themselves.

36. The Court erred in not holding that the Trading with the Enemy Act could not without contravening the due process clause of the Constitution authorize the Alien Property Custodian to seize

by judicial proceeding property not owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy.

Wherefore claimants pray that said order for mandate, as well as the decree of the District Court, be reversed and that the said Circuit Court of Appeals for the Second Circuit be ordered to enter a decree reversing the decree of the District Court of the United States for the Southern District of New York, and directing that a decree be entered adjudging that the property libelled herein be restored to the custody of these claimants and giving to these claimants such other and further relief as may be just.

MILLER, KING, LANE & TRAFFORD,
Proctors for Claimants.

80 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Francis P. Garvan, as Alien Property Custodian, Libellant-Appellee, against $100,000 Par Value St. Paul etc., Bonds, etc.; Edwin G. Merrill, and Others, Claimants-Appellants. Copy. Assignment of Errors. Miller, King, Lane & Trafford, Proctors for Claimants-Appellants, 80 Broadway, Borough of Manhattan, New York City. Filed May 25, 1920.

81 District Court of the United States of America for the Southern District of New York, in the Second Circuit.

FRANCIS P. GARVAN, as Alien Property Custodian, Libellant and Appellee,

against

$100,000 PAR VALUE ST. PAUL & KANSAS CITY SHORT LINE Railroad Company First Mortgage 4½% Bonds, Maturing in 1941 and Other Property; Edwin G. Merrill, James Speyer and Frank A. Vanderlip, Individually and as Trustees under a Deed of Trust Made by the Allianz Insurance Company, Claimants and Appellants.

Bond on Appeal.

Know all men by these presents, That Edwin G. Merrill, James Speyer and Frank A. Vanderlip, individually and as Trustees under a Deed of Trust made by the Allianz Insurance Company, as principals, and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Francis P. Garvan, as Alien Property Custodian, in the sum of Two Hundred and Fifty ($250.00) Dollars to be paid to the said Francis P. Garvan, as Alien Property Custodian, for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 24th day of May, 1920.

Whereas, the above named Edwin G. Merrill, James Speyer and Frank A. Vanderlip, individually and as Trustees under a Deed of Trust made by the Allianz Insurance Company have prosecuted a writ of error to the United States Supreme Court, to review the order for mandate rendered in the above entitled suit, by a Judge of the Circuit Court of Appeals of the United States for the Second Circuit.

Now, therefore, the condition of this obligation is such, that if the above named Edwin G. Merrill, James Speyer and Frank A. Vanderlip, individually and as Trustees under a Deed of Trust made by the Allianz Insurance Company, shall prosecute said writ of error to effect, and answer all costs if they fail to make their plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

EDWIN G. MERRILL. [L. S.]
For Himself and for James Speyer and Frank A. Vanderlip, Trustees.
NATIONAL SURETY COMPANY,
By H. E. EMMETT,
Resident Vice-President.

Attest:
E. M. McCARTHY,
Resident Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this 24th day of May, 1920, before me personally came the within named Edwin G. Merrill to me known, and known to me to be the individual described in and who executed the within bond and he acknowledged that he executed the same for and on behalf of himself and James Speyer and Frank A. Vanderlip, Trustees.

[Seal of Notary.] WM. B. AUSTIN,
Notary Public, Kings County.

Certificate filed in N. Y. County.
Kings County Clerk's No. 52.
Kings County Register's No. 2057.
New York County Clerk's No. 122.
New York County Register's No. 2107.

82 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 24th day of May, 1920, before me personally came H. E. Emmett, known to me to be the Resident Vice-President of National Surety Company, the corporation described in and which executed the foregoing Bond of Edwin G. Merrill, and others, etc., as surety and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal

thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York, that said Company has complied with the provisions of the Act of Congress of August 13, 1894, that the seal affixed to the within Bond of Edwin G. Merrill, and others, etc., is the corporate seal of said National Surety Company, and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Resident Vice-President of said Company, and that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Ten Million dollars.

(Deponent's Signature.)

Signed, sworn to, and acknowledged before me this 24th day of May, 1920.

J. A. HERRMANN, N. P.

STATE OF NEW YORK,
County of New York, ss:

On this — day of —— 191–, before me personally came ——; to me known, who, being by me duly sworn, did depose and say that he resides in ——; that he is the —— of the —— the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order.

[Endorsed:] District Court of United States, Southern District of New York. Francis P. Garvan, as Alien Property Custodian, against Edwin G. Merrill, and others, etc. Bond on Appeal. Surety: National Surety Company. Miller, King, Lane & Trafford, Attorneys for Claimants-Appellants, 80 Broadway, N. Y. I approve of the written Bond, and of the sufficiency of the surety thereon. H. G. Ward, U. S. C. J.

83 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 82 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Francis P. Garvan, as Alien Property Custodian, against $100,000 Par Value St. Paul & Kansas City Short Line R. R. Co. 1st Mtg.

&c., &c., as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of June in the year of our Lord One Thousand Nine Hundred and Twenty and of the Independence of the said United States the One Hundred and forty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

84 Supreme Court of the United States.

EDWIN G. MERRILL, JAMES SPEYER and FRANK A. VANDERLIP, Individually and as Trustees under a Deed of Trust Made by the Allianz Insurance Company, Plaintiffs in Error,

against

FRANCIS P. GARVAN, as Alien Property Custodian, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the Circuit Court of Appeals of the United States for the Second Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the United States Circuit Court of Appeals before you, or some of you, in an action entitled Garvan vs. $100,000 par value bonds, etc., between Francis P. Garvan, as Alien Property Custodian, libellant-appellee, and Edwin G. Merrill, James Speyer and Frank A. Vanderlip, individually and as trustees under a Deed of Trust made by the Allianz Insurance Company, claimants-appellants, a manifest error hath happened, to the great damage of the said Edwin G. Merrill, James Speyer and Frank A. Vanderlip, individually and as trustees under the said Deed of Trust, as is said and appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do

85 command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that

error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 24th day of May, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

86 [Endorsed:] Supreme Court of the United States. Edwin G. Merrill, and Others, Individually and as Trustees under a Deed of Trust, Plaintiffs in Error, against Francis P. Garvan, as Alien Property Custodian, Defendant in Error. Writ of Error. Miller, King, Lane & Trafford, Attorneys for Plaintiffs in Error, 80 Broadway, Borough of Manhattan, New York City. Service of a copy of the within Writ of Error is hereby admitted May —, 1920 —— ——, Attorney for Defendant in Error.

[Stamped:] United States Circuit Court of Appeals Second Circuit. Filed May 25, 1920. William Parkin, Clerk.

[Stamped:] A copy of the within paper has been this day received at this office. May 25, 1920. Francis G. Caffey, U. S. Attorney.

87 Supreme Court of the United States.

EDWIN G. MERRILL, JAMES SPEYER and FRANK A. VANDERLIP, Individually and as Trustees under a Deed of Trust Made by the Allianz Insurance Company, Plaintiffs in Error,

against

FRANCIS P. GARVAN, as Alien Property Custodian, Defendant in Error.

Citation.

By the Honorable One of the Judges of the United States Circuit Court of Appeals for the Second Circuit, to Francis P. Garvan, as Alien Property Custodian, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the City of Washington, District of Columbia, on the 22nd day of June, A. D. 1920, pursuant to an order allowing a writ of error, filed and entered in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, to review an order for mandate, signed, filed and entered on the 16th day of March, 1920, in that certain suit entitled Garvan vs. $100,000 par value bonds, etc., wherein Edwin G. Merrill, James Speyer and Frank A. Vanderlip, individually and

as trustees under a Deed of Trust made by the Allianz Insurance Company, are Claimants-Appellants, and you are Libellant-Appellee, to show cause, if any they be, why the order and decree rendered against the said claimants-appellants as in said order allowing a writ of error mentioned, should not be corrected, and why justice
88 should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the Southern District of New York, Second Circuit, this 24 day of May, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fourth.

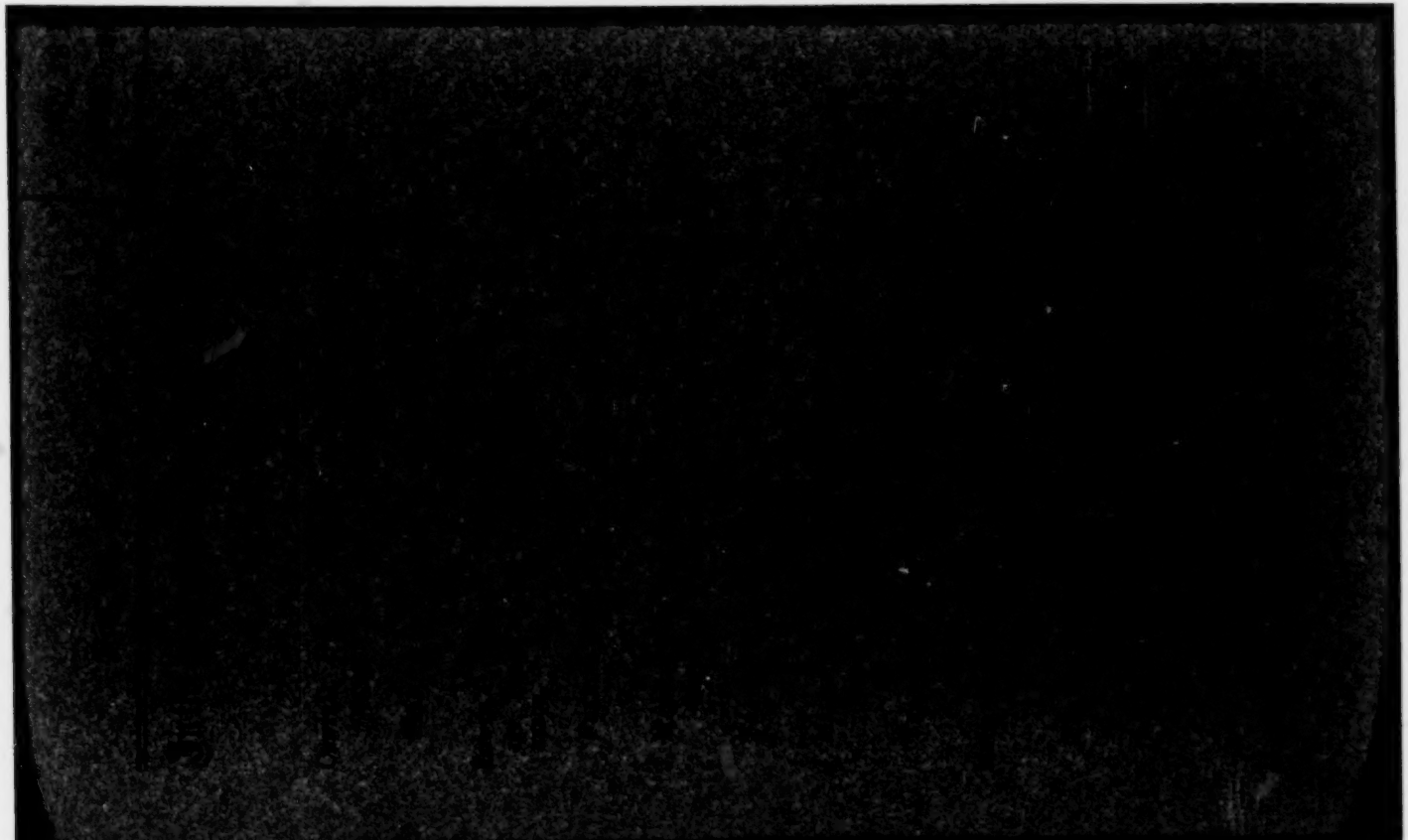
H. G. WARD,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

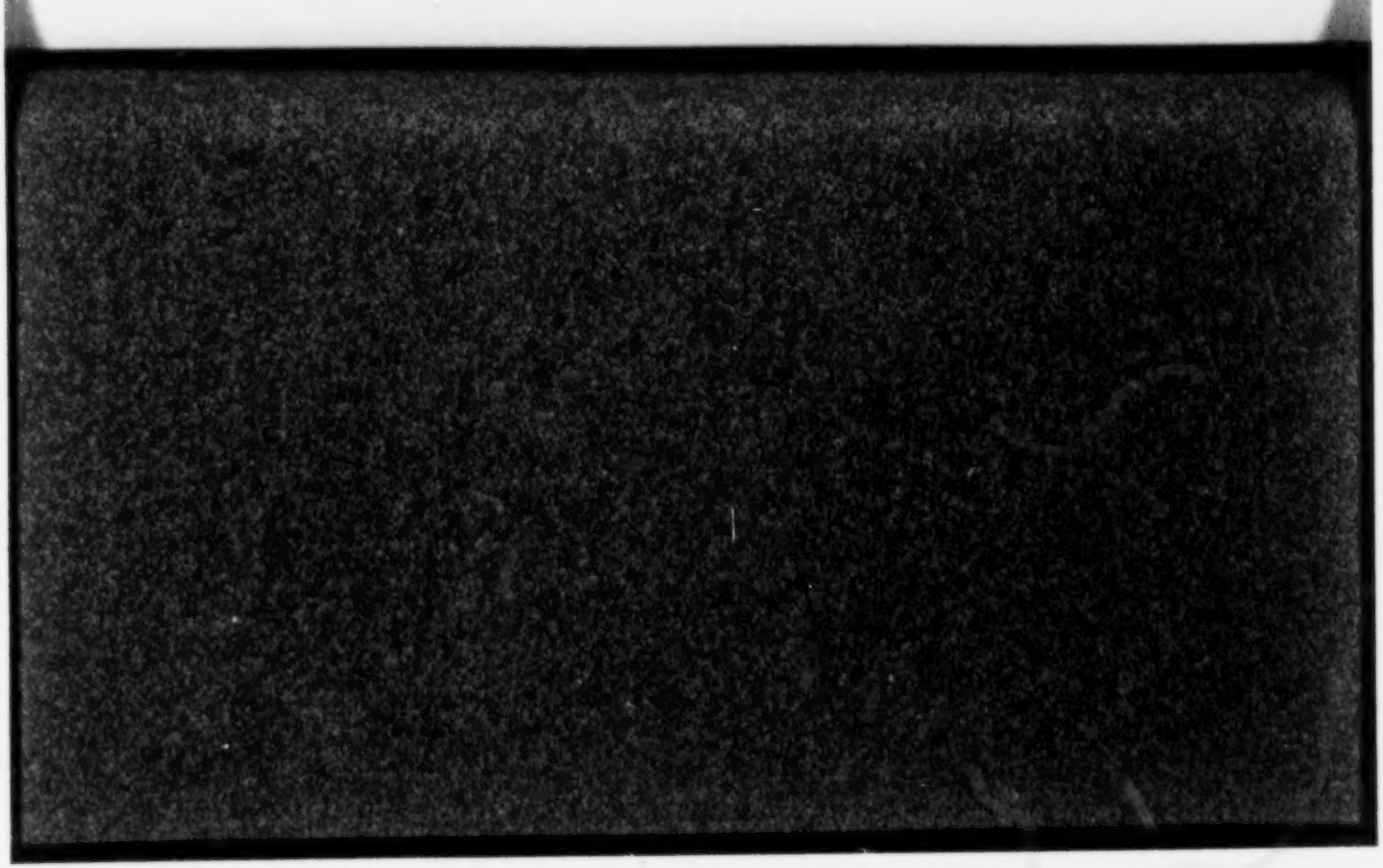
89 [Endorsed:] Supreme Court of the United States. Edwin G. Merrill, and Others, Individually and as Trustees under a Deed of Trust, Plaintiffs in Error, against Francis P. Garvan, as Alien Property Custodian, Defendant in Error. Citation. Miller, King, Lane & Trafford, Attorneys for Plaintiffs in Error, 80 Broadway, Borough of Manhattan, New York City. Service of a copy of the within Citation is hereby admitted, May —, 1920. —— ——, Attorney for Defendant in Error.

[Stamped:] United States Circuit Court of Appeals Second Circuit Filed May 25, 1920. William Parkin, Clerk.

[Stamped:] A copy of the within paper has been this day received at this office. May 25, 1920. Francis G. Caffey, U. S. Attorney.

Endorsed on cover: File No. 27,750. U. S. Circuit Court Appeals, 2d Circuit. Term No. 393. Edwin G. Merrill, James Speyer, and Frank A. Vanderlip, individually and as trustees, &c., plaintiffs in error, vs. Francis P. Garvan, as Alien Property Custodian. Filed June 14th, 1920. File No. 27,750.





In the Supreme Court of the United States.

OCTOBER TERM, 1920.

CENTRAL UNION TRUST COMPANY OF NEW YORK, Individually and as trustee, &c., plaintiff in error,
v.
FRANCIS P. GARVAN, AS ALIEN PROPERTY CUSTODIAN. — No. 392.

EDWIN G. MERRILL, JAMES SPEYER, AND FRANK A. Vanderlip, individually and as trustees, &c., plaintiffs in error,
v.
FRANCIS P. GARVAN, AS ALIEN PROPERTY CUSTODIAN. — No. 393.

J. MARKHAM MARSHALL, WALTER T. ROSEN, AND Rudolph Metz, as trustees, &c., plaintiffs in error,
v.
FRANCIS P. GARVAN, AS ALIEN PROPERTY CUSTODIAN. — No. 394.

J. MARKHAM MARSHALL, WALTER T. ROSEN, AND Rudolph Metz, as trustees, &c., plaintiffs in error,
v.
FRANCIS P. GARVAN, AS ALIEN PROPERTY CUSTODIAN. — No. 395.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW York, trustee, &c., plaintiff in error,
v.
FRANCIS P. GARVAN, AS ALIEN PROPERTY CUSTODIAN. — No. 396.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

20008—20

MOTION TO ADVANCE.

Comes now the Solicitor General and moves the court to advance the above-entitled causes and set them for hearing on January 3, 1921.

These cases all depend upon the determination of the same question, involving the construction of the Trading With The Enemy Act of October 6, 1917 (40 Stat., c. 106, p. 411), as amended by the Act of November 4, 1918 (40 Stat., c. 201, p. 1020). The question presented is the right of the Alien Property Custodian to the possession of securities which had been deposited by German insurance companies doing business in this country before the war with trustees as required by the laws of the various States for the protection of American policyholders and creditors. The claim of the Government is that the Alien Property Custodian is entitled to the possession of these securities, the rights of policyholders and creditors being fully protected by the Act of Congress. Both the District Court and the Circuit Court of Appeals sustained this claim, and the cases are here on writ of error.

The Alien Property Custodian is now engaged, as required by the law, in liquidating the American affairs of these German insurance companies, and this, of course, is embarrassed and delayed by the pendency of these suits. Large amounts are involved. It is of great importance that the ques-

tion involved be speedily determined, to the end that the great interests committed to the custodian may be properly administered and wound up.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

NOVEMBER, 1920.

○

DEC 22 1920
JAMES D. MAHER
CLERK

Supreme Court of the United States.

CENTRAL UNION TRUST COMPANY OF NEW YORK, individually and as trustee, etc.,
Plaintiff-in-Error,
against
FRANCIS P. GARVAN, as Alien Property Custodian,
Defendant-in-Error.

October Term, 1920.
No. 392.

EDWIN G. MERRIL, JAMES SPEYER and FRANK A. VANDERLIP, individually and as trustees, etc.,
Plaintiffs-in-Error,
against
FRANCIS P. GARVAN, as Alien Property Custodian,
Defendant-in-Error.

October Term, 1920.
No. 393.

BRIEF FOR PLAINTIFFS-IN-ERROR

MILLER, KING, LANE & TRAFFORD,
Attorneys for Plaintiffs-in-Error,
No. 20 Broadway,
New York City.

PERRY D. TRAFFORD,
Counsel.

B. H. Tyree, Printer, 206-8 Fulton Street, New York.

INDEX.

	PAGE
Statement	1
Facts	4
Hearings in the court below	8
The decrees	9
The questions involved	10
Manner in which the questions were raised	11
Assignment of errors	12
Summary of argument	13
POINT I.—It is plain from the language of the Trading with the Enemy Act—and especially when the words selected are contrasted sharply with those proposed in the bill as originally introduced in Congress—that the property thereby directed to be transferred to the Alien Property Custodian is enemy property only	14
POINT II.—The property which has been libeled is not enemy property but a trust fund, legally established, owned by an American citizen, and held by it primarily, if not wholly, for the benefit of American policyholders and creditors	26

PAGE.

POINT III.—The Act does not direct the transfer to the Alien Property Custodian of property owned by others in which an enemy happens to have some sort of contingent or reversionary interest 34

(A) It appears from the statute itself that it is enemy property and the rights of enemies therein which are taken, and not all property in which an enemy may have an interest 34

(B) Section 8-(a) of the Act was not intended to enlarge the description contained in Section 7-(c) of the property required to be transferred to the Custodian..... 41

(C) Even if the curious construction which has been suggested for Section 8-(a) should be adopted it does not require the transfer of the securities..... 54

POINT IV.—The facts upon which the Alien Property Custodian has concluded that the property sought to be seized belongs to the Insurance Company within the meaning of the Act are all before this Court and undisputed and raise a question of law which should be passed upon by the court..... 55

(A) If the Act relates to enemy property only, it will hardly be denied that the court should not direct the

PAGE.

transfer of property which is not enemy property 55

(B) Even if the Act should be construed as relating to all property which the Custodian after investigation may determine to be enemy property, yet, when he asks the aid of the Court, and it appears upon the undisputed facts that he is not entitled as a matter of law to the relief he seeks, such relief should be denied 56

(C) Under any view the trustees are entitled to their day in Court before they can be required to deliver the property from their possession to the Custodian 61

CONCLUSION—The decrees entered below should be reversed and the Marshal for the Southern District of New York should be directed to restore the property proceeded against in these two causes to the possession of the plaintiff-in-error and plaintiffs-in-error in these causes respectively 65

APPENDIX 66

Table of Cases

	PAGE
Allianz case (Garvan *v.* $20,000 bonds), 265 Fed. 477	9–10
American School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94	59
Bigelow *v.* Forest, 9 Wall 339	26–33
Brackett *v.* Middlesex Banking Co., 89 Conn. 645	30
Burbank *v.* Conrad, 96 U. S. 291	39
Burfenning *v.* Chicago, St. Paul &c., Ry., 163 U. S. 321	
Clinkenbeard *v.* U. S., 21 Wallace 65	60
Conrad *v.* Waples, 96 U. S. 279	39
Cooke *v.* Warner, 56 Conn. 234	30–41
Day *v.* Micou, 18 Wall. 156	26–33–38
Frankfort case (Garvan *v.* $20,000 bonds), 265 Fed. 477	9–10
Garvan *v.* $20,000 bonds and three other cases, 265 Fed. 477	9–10
Gonzales *v.* Williams, 192 U. S. 1	59
Home Provident Safety Fund Asso. (Matter of), 129 N. Y. 288	30–33–41
Kahn *v.* Garvin, 263 Fed. 909	63
Lancashire Insurance Co. *v.* Maxwell, 131 N. Y. 286	30
People *v.* Chapman, 64 N. Y. 557	30–41
Raymond *v.* Security Trust & Ins. Co., 44 Misc. (N. Y.) 31	41
Rickman *v.* Rickman, 180 Mich. 224	41

PAGE.

Risley *v.* Phenix Bank, 83 N. Y. 318; 111 U. S. 125 26–33

Ruggles *v.* Chapman, 59 N. Y. 163 30–41

Taylor *v.* Davis, 110 U. S. 320 29

The Confiscation Cases, Claim of Marcuard, 20 Wall. 114 39

United States *v.* Sherman, 237 U. S. 146 ... 60

Waite *v.* Macy, 246 U. S. 606 59

Argued by
PERRY D. TRAFFORD.

Supreme Court of the United States.

CENTRAL UNION TRUST COMPANY OF NEW YORK, individually and as trustee, etc., Plaintiff in Error, *against* FRANCIS P. GARVAN, as Alien Property Custodian, Defendant in Error.	October Term, 1920. No. 392.
EDWIN G. MERRILL, JAMES SPEYER and FRANK A. VANDERLIP, individually and as trustees, etc., Plaintiffs in Error, *against* FRANCIS P. GARVAN, as Alien Property Custodian, Defendant in Error.	October Term, 1920. No. 393.

BRIEF FOR PLAINTIFFS-IN-ERROR.

Statement.

These cases come here on writs of error to the United States Circuit Court of Appeals for the

Second Circuit, the plaintiffs in error (claimants below) seeking a review of the decisions of that Court which affirmed the decrees of the United States District Court for the Southern District of New York which directed the Marshal to deliver to the Alien Property Custodian, the defendant in error, certain securities which he had taken from the possession of the plaintiffs in error.

This court will be asked to construe those portions of the Trading with the Enemy Act which relate to the transfer of property to the Alien Property Custodian, the principal question being whether that Act directs such transfer to the said Custodian of *enemy* property only, or of *all* property which said Custodian may determine is enemy owned. The plaintiffs in error who raise this question are American citizens, acting under deeds of trust by the terms of which they have contracted (among other things) to hold the said libelled securities in trust for the protection of American policy holders and creditors until it shall be established that all claims against the foreign Insurance Company which made the deeds have been satisfied.

These proceedings were instituted by the Alien Property Custodian by the filing of libels of information and the seizure by the Marshal of the securities described in the said libels. In the first of these cases he alleged, (fol. 3) in substance that his predecessor had, after investigation, determined that the Frankfort General Insurance Company was an enemy, and that the securities libelled in that proceeding belonged to it. (This case is referred to hereafter as the "Frankfort case"). In the second of these cases he alleged (fol. 3), similarly, that the Allianz Insurance

Company was an enemy and that the securities libelled in that proceeding belonged to it. (This case is referred to hereafter as the "Allianz case"). The order of the United States District Court authorizing the seizure required all persons having any claims "to *possession* of said property or any part or parcel thereof" to present them to that court. The securities libelled in the *first* of these proceedings were held by the Central Union Trust Company of New York as trustee under a certain deed of trust, and the securities libelled in the *second* of these proceedings, although taken from the custody of the Central Union Trust Company of New York, were held by Edwin G. Merrill, James Speyer and Frank A. Vanderlip, as trustees under another deed of trust. The said Central Union Trust Company of New York, as trustee, and the said Edwin G. Merrill, James Speyer and Frank A. Vanderlip, as trustees, made claims respectively in the appropriate proceeding to the securities taken from them and filed answers. The Alien Property Custodian then moved upon the pleadings in each of these proceedings for the award to him of the possession of the property thus seized—so that the undisputed facts, upon which these cases were decided in the courts below, are those contained in the petitions of the Custodian admitted by the answers and those stated in the answers.

Since the facts and the questions arising in both of these proceedings are substantially the same, this one brief is filed on behalf of the said plaintiffs in error in both proceedings. The words "trustees," "claimants" and "plaintiffs in error" are all used below to designate both the

trustee holding the trust funds in the *first* proceeding and the trustees jointly holding the trust funds in the *second* proceeding.

Facts.

By the laws of Massachusetts and other States, the total amount of the liabilities which a foreign Insurance Company may incur and the maximum amount of the several policies of insurance which it may write are determined by the amount of its assets immediately available *in this country* to meet the claims of its policyholders and creditors *in this country;* and, in determining the amount of such assets, property transferred by such a foreign Insurance Company to trustees in this country to be held in trust *primarily* to meet the claims of policyholders and creditors is added to the amount of that deposited in the Insurance Departments of the several States (Answers, par. 7, and Exhibit A; *Frankfort* case, fols. 20, 30-32; *Allianz* case, fols. 20, 29-32).

In 1898, an insurance company which at the present time is known as the Frankfort General Insurance Company, made a deed of trust to certain trustees, who have been succeeded by Central Union Trust Company of New York (plaintiff in error in the first proceeding), upon the following trusts (as paraphrazed in the answer):

> "To receive, hold, possess and safely keep all property of every kind which should be delivered to them at any time by said Company; with power (upon consent of said Company) to invest and reinvest said property, and to that end to make all necessary sales, conveyances, etc.; to use and appropriate the said property, to satisfy the purposes men-

tioned in the Insurance Laws of Massachusetts hereinabove referred to (in other words, for the benefit of all the policyholders and creditors of said Company in the United States); with power to said trustees, if at any time the debts and liabilities for the security of which the trust was created should accrue and become due and payable by the said Insurance Company and should not be otherwise satisfied and paid, to appropriate so much of the trust property as might be necessary for the payment and satisfaction thereof; and, subject to the above trust, to hold the property in trust for the said Insurance Company, upon the express agreement, however, that until the outstanding liabilities and obligations absolute or contingent to policyholders or creditors in the United States should be fully paid and discharged, the said trust fund should remain in the possession of said trustees for the security and protection of said policyholders and creditors (anything in the trust agreement contained to the contrary notwithstanding), and further that there should be no withdrawal of the trust funds by the said Insurance Company until it should furnish competent evidence that all its outstanding liabilities and obligations had been duly paid and provided for."

(Answer in Frankfort case, paragraph 8, also Exhibit B, fols. 21, 22, 33-42.)

In 1911, the Allianz Insurance Company executed a deed of trust to Edwin G. Merrill, James Speyer and Frank A. Vanderlip, as trustees (plaintiffs in error in the second proceeding) upon the following trusts (as paraphrazed in the answer):

"To receive, hold, possess and preserve, so much of the property of said Insurance Company as might be necessary to maintain un-

impaired the sums deposited with the Insurance Departments of the State of Massachusetts and New York as a deposit capital, as required by the laws of said States, over and above all the liabilities of said Insurance Company arising out of its business in the United States, with power (upon consent of said Company) to invest and reinvest said property, and to that end to make all necessary sales, conveyances, etc.; to use and appropriate the said property for the purposes mentioned in the Insurance Laws of Massachusetts and New York hereinabove referred to, (in other words for the benefit of all the policyholders and creditors of said Company in the United States); with power to said trustees, if at any time the debts and liabilities for the security of which the trust was created should accrue and become due and payable by the said Insurance Company and should not be otherwise satisfied and paid, to appropriate so much of the trust property as might be necessary for the payment and satisfaction thereof, and for that purpose to sell the said property; and subject to the above trust to hold the property in trust for the said Insurance Company, upon the express agreement, however, that no portion of the funds or property held in trust as aforesaid should be returned to said Insurance Company without a certificate by the Insurance Commissioner of Massachusetts stating that the sum or portion thereof therein specified is no longer needed for the purpose of said trust."

(Answer in Allianz case, paragraph 8, also Exhibit B, fols. 20, 21, 31-40.)

The trust deeds became effective, copies thereof were filed with the Superintendent of Insurance of the State of Massachusetts (Answers, paragraph 9), and securities were thereupon delivered

to the trustees, the securities proceeded against in these libels being held pursuant to the terms of said deeds. (Answers, paragraph 10.) These insurance companies carried on their business in the States of Massachusetts, New York and elsewhere, and wrote many policies of insurance. The policyholders relied upon the security afforded by the trust deeds and the property held by the trustees, the terms of the trust deeds and the nature and amount of the securities held pursuant thereto having been made public. (Answers, paragraph 11.) There are now many *claims* outstanding against the insurance companies which are unpaid, the exact amount of which cannot be stated. (Answers, paragraph 12.)

There are outstanding a large number of *policies of insurance* aggregating a large sum, the exact total of which cannot be stated. In the *Frankfort case*, the policies have been issued to employers to protect them against judgments for damages as a result of accidental injuries, and all suits which may be brought against employers have not been brought and reduced to judgment, and it is not possible to ascertain the full amount of claims which may be asserted hereafter by policyholders. It will not be possible, therefore, within the six months after the end of the war for the said policyholders to ascertain the amount of their claims and to assert their rights to be paid out of the funds which have been held in trust for their benefit. (Answer, paragraph 13.)

The duly appointed Alien Property Custodian delivered to the trustees demands, copies of which are attached to the libels. (Answers, paragraph 14.) Thereafter, on June 30, 1919, the United States Marshal, acting under a warrant issued

upon the petition of Francis P. Garvan, the duly appointed Alien Property Custodian, seized from the trustees all the property described in the libel in these proceedings, and the said property is no longer in the possession of the trustees. (Answers, paragraph 15.) The outstanding liabilities and obligations of the insurance company to policyholders and creditors in the United States have not been fully paid as is required by the terms of the trust deeds before said insurance company can become entitled to receive the trust funds. (Answers, paragraph 16.) The conclusion that the securities libeled herein belong to the enemy is expressly denied. The only facts or documents which in any way bear upon the ownership of the property are those set forth in paragraphs 7 to 16 inclusive of the answers (substantially as set forth above) and the question of the ownership of the property is, therefore, one of law. (Answers, paragraph 17.) The trustees have incurred expenses in the administration of their trusts and are entitled to compensation for their services. (Answers, paragraph 19.)

Hearings in the Court Below.

These two cases were argued in the United States District Court after the decision of the two cases of Marshal *vs.* Garvan (now Nos. 394 and 395 on the calendar for the October Term of this Court), which are hereinafter referred to as the Munich Insurance Company cases. The questions were nevertheless again considered by Judge Augustus N. Hand of that court and his opinion in these cases is in effect a supplement to his opinion in those cases. In this connection

perhaps we should point out that the points of any importance in which the trust deeds in these cases differ from the deeds in the Munich Insurance Company cases would seem to be:

(1) That in the Munich Insurance Company deed the property is said to be held for the purpose of the insurance laws "in trust for the Company", while in these cases the language used is "and *subject thereto* to be held in trust", etc. (See Paragraph First of all three deeds), and

(2) That in the Frankfort Insurance Company deed it is provided (end of Ninth Paragraph), in emphatic terms, that funds shall not be withdrawn from the possession of the trustee except upon a certificate of the Insurance Commissioner or other competent evidence that all "outstanding liabilities and obligations are fully paid and provided for", and in the Allianz Insurance Company deed it is provided similarly (end of First Paragraph) that funds shall not be returned to the Insurance Company except upon the certificate of the said Commissioner.

The Decrees.

The decrees of the United States District Court in these cases awarded possession of the securities libelled to the Alien Property Custodian, directing that they be held, administered and accounted for by him as such Custodian and directing further that the Marshal make delivery of said securities accordingly. (*Frankfort case*, fols. 47, 48; *Allianz case*, fols. 45, 46.)

These decrees were affirmed by the Circuit Court of Appeals. (*Frankfort case*, fol. 68; *Allianz case*, fol. 66.)

The Questions Involved.

These cases in the Circuit Court of Appeals are reported in 265 Fed. Rep. 477.

The only question directly involved was whether the Custodian was entitled to the possession of the libeled securities to be administered by him as such Custodian.

Underlying this, however, were other questions, including the following:

1. Does the Trading with the Enemy Act direct the transfer to the Custodian of property which is *not owned by an enemy?*

2. Was the libeled property owned by the enemy insurance company; or was it a fund held in trust for citizens?

3. Does the Trading with the Enemy Act direct the transfer of property to the Custodian which is not enemy owned, if it appears that he has, or may have, some interest therein?

This question involves consideration of the following:

(A) What is the meaning of Section 7(c) of the Act?

(B) Does Section 8(a) of the Act enlarge the meaning of Section 7(c)?

(C) If Section 8(a) does affect the plain meaning of Section 7 (c), does it give the Custodian the right to take the libeled property?

4. The facts upon which the Custodian based his determination being all before the Court, is it bound to shut its eyes to them?

This question involves consideration of the following:

(A) If the Act directs the transfer of enemy property only, can the Court consider the facts?

(B) If the Act directs the transfer of all property which the Custodian may determine to be enemy owned, can the Court, when appealed to upon a record showing all the facts, review the Custodian's conclusion of law?

(C) Are not the trustees entitled to their day in Court before giving over the fund to the Custodian for administration by him pursuant to the Act?

Manner in which the Questions were raised.

The only rulings made by the United States Circuit Court of Appeals is contained in its decrees affirming the decrees of the United States District Court which awarded possession to the Custodian; and the plaintiffs in error, claiming that these rulings were erroneous, have sued out writs of error as aforesaid.

Assignment of Errors.

The assignment of errors thirty-six in number, are printed in the records (Frankfort case, fols. 75-82, Allianz case, fols. 73-80); and it would serve no useful purpose to repeat them all at this point, especially as it will no doubt be conceded that they are sufficient to point out particularly every error which this court is requested to review. Some of these assignments, however, are as follows:

3. The Court erred in holding that the libellant was entitled to the relief granted herein

or to any relief, and in not holding that the said libel should be dismissed.

4. The Court erred in adjudging that the libellant was entitled to the possession of the property described in the libel.

5. The Court erred in adjudging that the libellant was entitled to the possession of the property described in the libel to be by him held, administered and accounted for as Alien Property Custodian.

6. The Court erred in adjudging that the United States Marshal for the Southern District of New York should deliver to the libellant the said property described in the libel.

8. The Court erred in holding that the Trading with the Enemy Act gave to the libellant any authority or jurisdiction over the property described in the libel.

10. The Court erred in not holding that the Trading with the Enemy Act does not authorize the seizure of property of American citizens because an enemy has some right in or claim against it.

12. The Court erred in not holding that the only property which the Alien Property Custodian is entitled to seize is property owned by enemies and the rights and claims of enemies in or against property which is owned by American citizens or in which American citizens have the right of possession.

15. The Court erred in not holding that the property described in the libel was not property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit or any enemy or an ally of enemy within the contemplation of the Trading with the Enemy

Act and that said property was not liable therefore to seizure pursuant to said act.

16. The Court erred in holding that although the property described in the libel was not property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of any enemy or an ally of enemy within the contemplation of the Trading with the Enemy Act, it was nevertheless liable to seizure pursuant to said Act; and that the determination of the Alien Property Custodian that said property is liable to seizure as belonging to an alien enemy is conclusive.

28. The Court erred in not holding that the claimant was entitled to continue to hold the property described in the libel until the purposes for which the trust had been created had been completed.

32. The Court erred in not holding that the trustee has a lien upon the fund for its compensation and the amount of its expenses, including counsel fees, and that its right to retain the libelled property in its possession to satisfy the said lien is protected by the Trading with the Enemy Act or is not interfered with by said Act.

Summary of Argument.

The argument, in behalf of the plaintiffs in error, follows the course outlined in the statement of the "Questions Involved" given above; and the considerations especially urged are set forth under the following "Points", which are stated together in the index to this brief:

POINT I.

It is plain from the language of the Trading with the Enemy Act—and especially when the words selected are contrasted sharply with those proposed in the bill as originally introduced in Congress—that the property thereby directed to be transferred to the Alien Property Custodian is enemy property only.

The Alien Property Custodian, in support of his claim that the court must direct the transfer of the libelled securities to him, may advance many other arguments, but when these are examined one after another, it will be found, we think, that the contention, upon which he really relies and must rely, is that under the wording of the statute he is entitled to a judgment transferring into his possession *any property whatsoever* and whether owned by an enemy, an American citizen or a neutral, provided only he makes demand therefor asserting that he has after investigation determined the property to be owned by an enemy; and this too although, when the property once comes into his possession, he may use it in every respect as if he were the absolute owner thereof, may sell it at his discretion and moreover may, out of the proceeds (under the direction of the President or the court), pay the claims of all debtors of that person whom he has determined to be an enemy and the owner of such property. His position appears very clearly from the libels in which he alleges only that he has determined that the libelled securities are owned by an enemy, and does *not* allege that the securities are in fact owned by an enemy. (Frankfort case, fol. 3, Allianz case, fol. 3.)

The act now under consideration, which is usually referred to, and which will be referred to hereafter, as the "Trading with the Enemy Act" is entitled "An Act to Define, Regulate and Punish Trading with the Enemy and for other Purposes." One of the "other purposes" was the seizure of enemy property and those portions of the Act which relate to that subject are Sections 6, 7, 8, 9, 12 and 17 (see Appendix at the end of this brief). These sections might have been embodied in a separate statute.

Section 6, in effect, appoints a Receiver of the property in the United States of each enemy, this Receiver being designated the Alien Property Custodian.

Section 7 (c) defines *what property may be seized by the said Receiver or Custodian.*

Without examining the text of this Section, we should expect with confidence that it would define the property to be taken possession of by the Custodian in the way to which we have all become accustomed—in other words, that it would direct the custodian to "step into the shoes" of the enemies of this country and seize all their property and acquire all their rights in or claims against property which American citizens owned or had the right to possess. We would be amazed if told that the Congress in seizing *enemy property* had attempted to take away the property of *American citizens.* This would be because there has never been such legislation, because such legislation would be opposed to all our traditions of respect for contracts, and especially because, so far as we have been able to ascertain, nothing was ever said in connection with the passage of this Act, or by way of comment upon it, suggesting that its pur-

pose was to enable the Alien Property Custodian to assert any rights which the enemies, whom he represented, could not themselves have asserted had there been no war.

The said Section 7 (c) *as originally introduced* in Congress read as follows (italics ours):

> "If the Secretary of Commerce, by direction of the President, shall so require, any money or other property owing or belonging to an enemy or ally of enemy *or* which the Secretary of Commerce, after investigation, shall determine is owing to or belongs to an enemy or ally of enemy, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian, under such rules and regulations as the Secretary of Commerce shall prescribe." (Senate Committee Hearings, p. 13, line 18 to p. 18, line 1.)

This Section 7 (c) *as passed and approved* on October 6, 1917, read as follows:

> "If the President shall so require, any money or other property owing to or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian."

In the act as passed, it will be seen that there were some changes of slight importance (which will be referred to later); and that there was one change which plainly was of the very greatest importance. The word *or* which we have printed in italics in the text of this section as introduced in Congress *had been stricken out;* and this change

amounted in effect to the substitution of the word *and* for the said word *or*. Of course, both under the wording proposed and that which was adopted this section would not go into effect unless the President should so direct. Under the section *as proposed*, the only other conditions of such transfer were *either* (1) that the property be in fact enemy owned *or* (2) determined by the Secretary, after investigation, to be enemy owned, while under the act *as passed*, property could be thus transferred only if the property was *both* (1) in fact enemy owned *and* (2) determined by the President, after investigation, to be enemy owned.

If we did not have the text of the Act as submitted to Congress before us to contrast with the Act as finally passed, it would be sufficient, we submit, to point out that the language adopted by Congress is perfectly plain and can only be construed as meaning that the property to be transferred must, in the first place, be enemy property and, in the second place, be determined to be such by the President after investigation. When, however, we are able (as we have done above) to call the attention of this Court to the words of this section as originally introduced in Congress, it seems unnecessary to make any further argument. For the meaning of this section, according to the contention of the Alien Property Custodian, is expressed, as plainly as it can be stated by his own counsel, *in the very words used in this section when submitted to the Congress;* and the Congress has *rejected* such language and has adopted another form of expression which is not capable of any such construction.

Whether, in omitting that word of the Bill as proposed which would have compelled the deliv-

ery to an administrative officer, upon his mere declaration of opinion, of any property, whether owned by an enemy or not, the Congress was actuated by its belief that such a seizure of the property of American citizens would be unconstitutional and, so far as the property of neutrals might be concerned, unfair and unwise, or by its conviction that this country did not wish to impose upon its citizens and neutrals such a great and unnecessary hardship, we cannot state. The *important point* is that upon consideration, the Congress very deliberately refrained from passing the statute in a form which would authorize seizure of anything other than *enemy* property.

As we have intimated, the language used is not in the least ambiguous and there is no occasion, therefore, to construe its meaning. No doubt, the contrary will be asserted by the Alien Property Custodian, and it is possible that he will urge, as in the court below, that, if the Act authorizes the transfer only of property which is in fact enemy owned, the words "which the President, after investigation, shall determine is so owned", have no meaning whatever. We urge, however, that the requirement on the face of the statute that the administrative officer who should be selected by the President to represent him should not act arbitrarily or upon suspicion but only "after investigation" is wise, as is also the requirement that the said officer shall make a clear cut determination or finding as a preliminary to the transfer of enemy owned property. In practice, we believe, such a "requirement" is a formal paper which is served upon the person having custody of the property and is preserved in his records. Moreover the Custodian is protected from the *ob-*

ligation to take over all enemy property, and in the case of "white elephants" need make no "requirement". This argument of the Custodian, therefore, if repeated in this Court, will be helpful only in calling attention very pointedly to that other argument which is bound to occur to the mind of any one examining this section: that, if *the contention of the Alien Property Custodian is sound, then the words "owned or belonging to an enemy or ally of enemy", which stand in the statute and form the very foundation of the statute, become utterly meaningless.*

While, as we have urged above, the meaning of this section is plain upon its face, yet if we go further into the study of this section, its meaning becomes, if possible, even more clear.

Section 7 (c), which is that portion of the Act and *the only portion of the Act which defines the property which is to be transferred to the Custodian*, now reads as follows: (The brackets in the quoted matter and the letters therein were not in the original text of the bill, but are used by us to mark not all but the more important changes in the bill as originally proposed which were made by the Committee or by subsequent amendments and which are referred to below).

> "(c) If the President shall so require any money or other property [(a) including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description] owing or belonging to [(b) or held for, by, on account of, or on behalf of, or for the benefit of,] an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall

determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian [(c) or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this Act].

The words in brackets marked (b) were inserted at the instance of Assistant Attorney-General Warren, who stated to the Senate Committee that "the bill provided for the temporary taking over *of enemy property*" and that "the theory of the bill is that *enemy property* shall not remain in the hands of the enemies' *debtor* or *agent* here" (Senate Committee Hearings, page 132). It is difficult to see how the words inserted at the suggestion of Mr. Warren could add to the force of the sweeping terms used in the act as originally proposed, substantially as given in the quotation above (without the bracketed matter): "Any money or other property * * * belonging to * * * an enemy or ally of enemy." This was recognized by Mr. Warren and he advised the Senate Committee that the matter sought to be added was "purely a verbal amendment, clarifying the language. *It does not make any substantial change*" (Senate Committee Hearings, p. 158). For that reason, no doubt, the language of Section 12 of the Act, which relates to the administration of property seized by the Custodian, and defines it as "all other property *of an enemy* or ally of an enemy", has remained unchanged.

The matter which we have placed in brackets and marked (a) and (c) in the quotation above of Section 7 (c) was added by amendment of November 4, 1918. After some experience with the

workings of the Act, the Alien Property Custodian procured the amendment which we have marked (a) above, which spreads out upon the face of the Act the statement that "any money or other property" includes "patents, copyrights, * * * and rights and claims of every character and description." Counsel for the Alien Property Custodian stated to the Committee in charge of the bill the effect of the act as he proposed to amend it as follows:

> "The amendatory matter to which we now call your attention provides, speaking broadly, that every right, title, and interest of the enemy, and every power of the enemy and liens and charges or encumbrances in favor of the enemy shall vest in the Alien Property Custodian" (Hearings before House Committee on Interstate and Foreign Commerce on H. R. 12,338, p. 13).

He thus pointed out that the Act is intended to go very far in order to include all the property and property rights of *enemies;* and, in fact, the intention of Congress is about as plain as words can make it that the Custodian is to take enemy property and all sorts of *rights and claims* of enemies. There is, however, no expression of any intention to have the Custodian take the property of American citizens in which, or against which, an enemy may happen to have *rights or claims.*

The Act of Nov. 4, 1918, also added to the original Section 7 (*c*), which had defined the property to be transferred, three other paragraphs which related not at all to the definition of property to be transferred, but contained administrative provisions (which logically should have been inserted elsewhere), some of which are referred to below.

The report upon the proposed act submitted by the Senate Committee on Commerce to the Senate, August 15, 1917 (Report No. 113, Calendar No. 115), begins by stating that the "*purpose of this bill* is to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations * * *. It also provides for the care and administration of the *property and property rights of enemies* and their allies in this country pending the war." This report refers to Section (7) (c) as the one which provides that the President may require "any *enemy* property to be paid to the Alien Property Custodian," and to Section 11 as containing provisions "for the preservation of *enemy property*" (pp. 7, 8). In fact the descriptive terms "*enemy property*" are used over and over again in this report (as in the Report of the House Committee attached to the report of the Senate Committee); and no reference is made to anything other than "*enemy property.*" The report, moreover, incorporates the general principles governing the bill as "well stated" by Assistant Attorney General Warren, quoting the latter's explanation to the Committee as follows: "the theory of the bill is that any *enemy* property in this country shall not remain in the hands of the enemy's debtor or agent here" (p. 3).

It should be kept in mind that Section 7 (c) in the original act is the only part thereof which defines the property which shall be transferred into the possession of the Alien Property Custodian; and, as we urged above, there would seem to be no room for doubt as to the meaning of that section. The Custodian argued, however, in the Courts below, that there were other sections of the Act and more especially amendments of the Act,

which had the effect of enlarging the description of property to be transferred to the Custodian as defined in said Section 7 (e). It is important to note that the sections thus relied upon relate only to administrative features of the law and form no part of the description of the property to be taken; and it would seem only reasonable to give force to them only insofar as they are consistent with what the Act has declared at the outset is the property which may be taken. The only sections and amendments which are likely to be urged now as having any real bearing are Sections 9 and 12, and the amendments to Section 7 (e).

Section 9 as enacted, and as amended by the Act of June 30, 1919, begins as follows:

> "That any person, not an enemy, or ally of enemy, claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder and held by him * * * may file with the custodian notice of his claim * * *" etc.

This is the section which goes on to describe certain remedies given to claimants under the Act. It may be urged by the custodian that the use of the words "any money or other property", without qualifying them by adding some such words as "belonging to an enemy or ally of enemy", should have the effect of enlarging the definition of property to be transferred contained in Sec. 7 (e). It should be sufficient to say in reply to this claim that the Congress, having first described the property which might properly be transferred to the custodian, might then refer in a later section to the property actually in his possession in

general terms, assuming that he would have only such property as he might properly receive. Moreover, in the administration of the Act it might very well happen that some property not belonging to an enemy would come into the possession of the Custodian and, of course, he might very well have property which alien enemies had been entitled to keep in their possession, although other parties had interests therein. To permit persons having some interest in the property in the hands of the custodian to lodge claims, pursuant to the terms of this section, became, therefore, a proper, and even necessary, arrangement; and it is hard to see any force in the argument that by the terms of this section, Congress evidenced its intention to direct the transfer of property owned by American citizens or neutrals to the Custodian.

Section 12, fourth paragraph, in its original form read as follows:

> "The Alien Property Custodian shall be vested with all the powers of a common law trustee in respect of all property, other than money, which shall come into his possession in pursuance to the provisions of this Act. * * *"

As amended by the Urgency Deficiency Act of March 28, 1918, it reads:

> "The Alien Property Custodian shall be vested with all the powers of a common law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered or paid over to him in pursuance of the provisions of this Act. * * *"

The custodian may contend that the same importance should be attached to the unqualified use of the words "all property" as he has claimed for the words "any money or other property" in section 9 referred to above, and we have already answered that contention. He may claim, moreover, in substance, that the use of the words "or shall be required to be" in this section, (although obviously it defines the powers of the custodian over property *after* it has come into his possession) has the effect of transferring to him, and authorizing him to control, all property which he may "require"—whether belonging to American citizens or not. This section, as originally enacted, related only to the property which came actually into the possession of the custodian; and the amendment now under discussion was made to cover those enemy *interests* in property lawfully in the possession of others which the custodian could not take into his possession, although he might by serving a "requirement" (and perhaps filing it pursuant to one of the 1918 additions to section 7 (e) of the Act) obtain all of the enemies' rights therein. The words "or shall be required to be", therefore, are intended to relate *not* to any property whatsoever that the custodian may assert that he has "required", but only to such property as might *lawfully* be required by him—that is the *interest of an enemy therein*.

One of the paragraphs, added by the said Act of Nov. 4, 1918, to said Section 7 (e)—at the end—is as follows:

> "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, trans-

> ferred, assigned, delivered, or paid over to the Alien Property Custodian or required so to be, or seized by him shall be that provided by the terms of this Act, etc. * * *".

The words "or required so to be" in this section have the same meaning as those in section 12, referred to above. They relate to property either *actually* in the possession of the custodian (receiver?) *or* constructively in his possession as the result of a *legal* "requirement"—in other words a "requirement" relating to property owned by an *enemy*.

That the United States District Court should not make a decree for the seizure of property not included in the terms of the Civil War Confiscation Act, and that the decree of the court in such case was no protection to parties complying with it, was established by many decisions.

> Bigelow *v.* Forest, 9 Wall. 339, 351.
> Day *v.* Micou, 18 Wall. 156, 161.
> Risley *v.* Phenix Bank, 83 N. Y. 331, 111 U. S. 125.

POINT II.

The property which has been libeled is not enemy property but a trust fund, legally established, owned by an American citizen, and held by it primarily, if not wholly, for the benefit of American policy holders and creditors.

The title to the libeled securities was transferred to the trustees by trust agreements made

long before the beginning of the war; and the trustees are, according to the ordinary and legal use of the word, the "owners" of this property. The trusts were created pursuant to the requirements of the statutes of the State of Massachusetts and the fund is, in substance, held pursuant to the laws of that state for the same purposes as other funds are held by the Insurance Commissioner of that State. Although the trustees own the property, they hold it, of course, for the benefit of others; and their obligations and duties are set forth in the said trust agreements, the important point being that, under the said agreements executed by the trustees, they assumed definite contractual obligations in reference to the fund, primarily to the policy holders of the insurance company and secondarily to the insurance company.

The Custodian contended in the courts below, in his effort to establish that these securities were owned by enemies, that they do not constitute trust funds at all and that no trusts were established by the said agreements.

The reason for such a position is fairly plain. The Custodian is forced, in order to justify his position, to claim that the Trading with the Enemy Act (by implication) destroys all contractual rights of American citizens in property, including the all important right of possession, provided it may be said that the property is owned by an enemy; but he is unwilling to carry his argument to its logical conclusion and assert that in all cases of property, held *in trust* by citizens of the United States for the benefit of other citizens of the United States, provided an enemy has some beneficial interest therein, the Alien Property Custodian may deprive the trustees of their pos-

session and destroy the obligations of the trust agreement.

It does not seem necessary to argue at length that lawful trusts were created by the terms of these instruments, and especially since the United States Circuit Court of Appeals has expressed its disagreement with the views of the Judge who heard these cases in the United States District Court on that point, saying: "It is apparent that the trustees hold primarily for the benefit of the policy holders and creditors and secondarily for the benefit of the companies; but their duties are active and they are not merely lien holders," and later that "they are as stated above, trustees with active duties." But in view of the error (as it seems to us) which crept into this case at the outset, we should perhaps give some consideration to this point.

Deeds of trust covering property held in this country for the benefit of American policy holders in foreign insurance companies in form similar to those in the cases now before this court have been in common use for many years, but it is probable that, until the point was urged by the Alien Property Custodian, it had never occurred to anyone that it would be possible to claim that these were not in fact trust deeds. Other trusts are created almost daily by deed and by will imposing upon the trustees obligations which are *essentially* the same as those in the deeds which are now questioned and in all these cases it cannot be doubted at the present day that a valid trust is created.

> "In its simplest elements a trust is a confidence reposed in one person called the trustee for the benefit of anyone, called a *cestui que trust*, with respect to the property held

by the former for the benefit of the latter." 39 Cyc. 18.

"A trustee may be defined generally as a person in whom some estate, interest or power in or affecting property is vested for the benefit of another." *Taylor* v. *Davis*, 110 U. S. 330, 335.

The trustees here hold, of course, the *legal title* to the property, since such an estate was necessary to carry out the provisions of the trust deed (Perry on Trusts, Sec. 312, 313). They agree to receive and "possess" the property, following the usual form of trusts of *personal property*, in which the trustees covenant to "stand possessed" —corresponding to the covenant to "stand seized" which can be used only in reference to real estate. They are not mere custodians, but have substantially the same duties as those of other trustees. They invest and reinvest the property, collect the income and pay it over to those who are entitled, and, moreover, are authorized in their discretion to pay the claims of policyholders and creditors when the amount and validity thereof have been admitted by the company or established in due course of law. This last provision is of importance, giving the trustees (who are appointed with the approval of the Superintendent of Insurance) discretion to pay claims at once out of the funds in their possession. Even a policyholder having a judgment against the Insurance Company cannot reach these trust funds by execution, although he may obtain immediate payment from these trustees pursuant to the trust instrument.

"Regardless of the particular power given to trustees, if it be one which calls for the

exercise of judgment and discretion, an active trust which the Statute of Uses does not affect is created and the legal title is vested in the trustees." 28 *Am. & Eng. Encyc.* 925.

It seems unnecessary to depend upon the general principles of the law of trusts to establish the proposition that a valid trust is created by such instruments as these which the Custodian now questions; for they are expressly sanctioned and declared to be trusts by the Statutes of Massachusetts (fols. 30, 31) and it happens that the authorities have passed decisively upon this very point.

Cook v. *Warner*, 56 Conn. 234;
Brackett v. *Middlesex Banking Co.*, 89 Conn. 645;
Lancashire Insurance Co. v. *Maxwell*, 131 N. Y. 286;
Matter of Home Provident Safety Fund Association, 129 N. Y. 288;
Ruggles v. *Chapman*, 59 N. Y. 163;
People ex rel. Ruggles v. *Chapman*, 64 N. Y. 557;

The substance of these decisions is summed up in

Cook v. *Warner*, 56 Conn. 234, at p. 239,

as follows:

"The effect of these statutes of our own and other states and of the act of the Continental Life Insurance Company in compliance therewith, is the creation of a trust fund in the hands of a trustee for a class of beneficiaries described with particularity; *as perfect a trust as can be created by deed or will and as much entitled to protection from the court.*"

We think the Alien Property Custodian has never in practice seized property held by trustees in any case except cases of funds held in trust for policyholders; and we believe that he will not assert now that, under the terms of the Act, the courts should direct that in ordinary cases property, held by an American trustee primarily in trust for *other* American citizens and secondarily for an enemy, should be directed to be paid to him. We insist, however, that his position on this point should be made plain to this court, and that, if he concedes that *in all other cases* he is not entitled to take over trust property, that he should be required to point out what the distinction is between such cases and these cases of property held for the benefit of policyholders pursuant to the insurance laws of the several states.

Take, for example, what is perhaps, in substance, the most common form of trust, whether created by deed or will, somewhat as follows:

Securities transferred to A in trust to hold them for the benefit of B (daughter of the maker of the trust?), an American citizen, during her life and on her death to deliver the principal to her issue; but, if there should be no such issue then living to deliver the principal of the fund to Z (another daughter of the maker of the trust?), a citizen of Germany. We believe that the Alien Property Custodian has never taken the position that he was entitled to seize such a trust fund and hold it in his hands discharged of the obligations imposed upon the trustee by the trust instrument, upon the *possibility* that A might die without issue so that the principal of the fund might become due *eventually* to an enemy.

There is, however, no difference between the supposititious case just referred to and the case

at bar. Here property has been transferred to trustees to hold for the benefit of B (in this case American policyholders and creditors) with remainder over in the event of a certain contingency (here the discharge of all claims of American policyholders and creditors) to Z, an enemy (here the German Insurance Company).

The Alien Property Custodian will not concede for a moment that the property in this suit, if it reaches his hands, will be held by him subject to the obligations created by the trust deed. His claim, however, is that all persons interested in the fund, if they act practically at once, may, under Section 9 of the Trading with the Enemy Act, obtain some relief. In the case of an ordinary *lienor* deprived of his right of possession, it may be that the relief suggested will be of practical value, but the situation in the case of a trust estate is altogether different. The *trustee* is deprived of the fund which he is entitled to use to enable him to perform the duties of his trust; and the *beneficiaries,* in a case like this, being many in number, uninformed as to their rights, and for that matter incapable of ascertaining them, will, as a practical matter, have no relief whatsoever against the Custodian. It is just because, for some reason or other, beneficiaries are unable to protect themselves that a trust is established. They look and must look to the trustee to protect them, but *a trustee deprived of his fund is deprived of the power to safeguard the rights of beneficiaries.*

It is idle to urge that a valid trust was not established by the instruments in this case by pointing out that in some respects the trustees were vested with great discretion and in other respects their discretion was limited by the terms of the

deed. Such terms (requiring the trustee to render accounts, controlling his power to make investments, permitting the withdrawal or substitution of funds, the appointment of successor trustees, etc.) and a great many other limitations and restrictions are of common occurrence in trust deeds.

Position of the Claimants as Trustees.

Probably there is no class of property which the court should be more jealous in protecting than that held by trustees; and one reason for this attitude is the strict accountability of trustees to the beneficiaries. It is, of course, the moral as well as the legal duty of trustees to protect funds confided to them against attacks; and they are, moreover, bound to do so for their own protection in such a case as this, since a decree authorizing the seizure of this property would be no protection to them when called upon to account many years later, if, as a matter of law, the Trading with the Enemy Act does not give the court jurisdiction over the property of American citizens.

Risley v. *Phenix Bank*, 83 N. Y. 318, 337;
Day v. *Micou*, 18 Wall 156, 160;
Bigelow v. *Forest*, 9 Wall 339, 351;
Matter of Home Provident Safety Fund Association, 129 N. Y. 288, 294.

As was said by the court in the *Matter of Home Provident Safety Fund Association* cited above (p. 294):

> "I see nowhere any authority in the court to itself take possession of the fund with the payment of which the trustee was itself

charged under and by virtue of a valid contract, *the obligations of which still remained as against the trustee.*"

It is both because of their duty to the beneficiaries and because of their right to be themselves protected, that the trustees have been constrained to appeal to this court from the ruling of the court below.

POINT III.

The act does not direct the transfer to the Alien Property Custodian of property owned by others in which an enemy happens to have some sort of contingent or reversionary interest.

A. IT APPEARS FROM THE STATUTE ITSELF THAT IT IS ENEMY PROPERTY AND THE RIGHTS OF ENEMIES THEREIN WHICH ARE TAKEN AND NOT ALL PROPERTY IN WHICH AN ENEMY MAY HAVE AN INTEREST.

As we understand the position of the Custodian, his principal claim is that he may take into his possession property owned by American citizens in which an enemy has some sort of interest, *not* because such property is in reality enemy property, but because his power is so great that he may seize property which is not enemy property at all (see Point I above); and it is quite possible that he will continue to urge that the securities libeled are not property held in trust, but the property of the enemy insurance company (see Point II above). It seems unlikely, however, that

he will contend that, even if this property should be held to be a trust fund, it must, nevertheless, be considered as *in fact* enemy property simply because under the terms of the trust deed something *may* remain to be delivered to the insurance company after the claims of all policyholders and creditors in this country have been satisfied. Probably in no other class of cases whatsoever has the Custodian made such a claim, and we feel sure that in no other class of cases has he taken trust funds from the possession of trustees where the funds were held primarily in trust for American citizens. Yet the American citizen who holds funds in trust for American policyholders and creditors pursuant to the insurance laws of the several States is in a position which is not different from, and is perhaps even more entitled to consideration than, trustees who hold under wills and other forms of trust deeds and all classes of lienors.

Upon the execution of the trust deed and the delivery of securities thereunder, the trustees became vested with the legal title to the property, having certain *rights* and subject to certain *obligations*. One of their *rights* (first in priority although relatively of small importance) was to have their compensation determined and their disbursements passed upon and to be paid for their services and reimbursed for their expenses out of the fund. Their principal *obligation* was to the American policyholders and creditors, the beneficiaries for whose benefit the fund was created. The other *obligation* was *contingent in character*: if and when the claims of American policyholders and creditors should be satisfied, to deliver the surplus of the fund to the German insurance company.

The Custodian now proposes *not* merely to seize any *rights* the German Insurance Company may have against the fund, but to take *the fund itself* out of the hands of the trustee and hold it and dispose of it as enemy-owned property—except to the extent that certain policyholders (of course, only those who have already suffered loss) may obtain judgments against him in separate suits brought pursuant to Section 9 of the Trading with the Enemy Act.

In this connection we should note that while the *entire ownership* of some property may be in one individual, there is a great deal of property, the ownership of which is in several or many different individuals, often with widely varying interests. Thus certain property may be held in shares by many persons, some of whom only have the right of possession or use, and further some such shares may be held by trustees who have the legal title, the beneficial interest being lodged in others, while some other shares may be subject to many successive liens.

When this Act went into effect there was in this country (1) property owned free and clear by enemies which became subject to transfer to the Custodian of course; and there was also (2) property which American citizens owned or had the right to possess, but in, or against which, enemies had various rights and claims.

Practically therefore it was possible to define the property which might be seized by the Custodian (if he was not limited to property owned by enemies free and clear) in only two ways, as follows:

(a) Enemy owned property and *rights and claims* of enemies in or against property which

American citizens owned or had the right to possess, and

(b) Enemy owned property and *property* which American citizens owned or had the right to possess, *provided* enemies had *any rights* therein or *claims thereon*.

The difference between the two classes of property thus described is very great indeed. The *first* class (a) is such property as a Receiver takes. It is all the property and rights which the enemy possesses, and the taking of such property and rights does not deprive American citizens of their property rights. The *second* class (b) includes property and rights *far greater than those of the enemy* and involves *necessarily* the taking away of the property rights of American citizens. If property described in the second class can be seized, it means that, in cases where practically all the property interests which go to make up *complete ownership* are lodged in American citizens, if there be any *right* to such property, however slight, belonging to an enemy, or even if an enemy has any *claim* thereto, that property may be taken from the possession of American citizens by the Custodian.

It is important that there should be no confusion of ideas on this point. *If the Custodian obtains property rights which enemies do not possess, he is to just that extent taking away what is not enemy property at all.*

The language of the Section 7 (c) of the Statute defining the property to be transferred leaves no doubt as to the intention of the Congress. It reads:

> "* * * any money or other property * * * and rights and claims of every

character and description, owing or belonging to * * * an enemy * * * shall be * * * transferred * * * to the Alien Property Custodian * * *."

It thus very sensibly directs the taking of such rights as enemies may have in the property of citizens ("a" above) and not of the property of citizens in which enemies may have some rights ("b" above).

The very point involved in the construction of this Trading with the Enemy Act has been passed upon by the courts in cases arising under the Confiscation Act of 1862 (12 Statutes, 589 Sections 5 and 6). This Act authorized the seizure "of all the estate and property, moneys, stocks and credits of" certain classes of persons. This is essentially the same as "any money or other property" of certain classes of persons in the Trading with the Enemy Act.

In *Day* v. *Micou*, 18 Wallace, 156, the United States Supreme Court held, in a case where real estate belonging to an enemy had been sold pursuant to the decree of condemnation of the United States District Court, that the interest of a mortgagee of the land was not affected by such a decree and that he could prosecute foreclosure proceedings. A clear statement of the effect of that Statute, which applies equally well to the Trading with the Enemy Act, is found in the language of Justice Strong in that case (p. 161) as follows:

> "It was not *any* property in which the persons described in these two sections might have an interest that was made subject to seizure, but it was *their* estate and property, *their* interest in it, whatever that interest might be. The Act manifestly contem-

plated no seizure of anything more than that which belonged to the offending person."

To the same effect, see

The Confiscation Cases, Claim of Maxwell, 20 Wall. 114, 115;
Barbank v. Conrad, 96 U. S. 291, 293;
Conrad v. Waples, 96 U. S. 279, 285.

Suppose that A, an American citizen, holds (first) property belonging to B, an enemy, and holds also (second) other property for the benefit of B and many others who are American citizens under an agreement by which it is to be sold at a certain time and the profits, if any, divided among all the persons having an interest therein. Of course, A will turn over the (*first* mentioned) *property owned* by an enemy, and, of course, the Custodian will succeed to the right or claim of the enemy, B, in the profits if any of the sale of the *other* (*second* mentioned) *property;* but surely the Custodian will not demand that the *other property* in the hands of A shall be transferred to the Custodian to be administered and disposed of by him.

Suppose property has been levied upon by a Sheriff under many judgments, one of the last of which has been obtained by an enemy. Of course, the Custodian will succeed to the rights of the enemy in the property levied upon, but he will not be entitled to take it from the hands of the Sheriff.

Suppose the property of an *enemy* is held by a receiver or trustee in bankruptcy or an assignee for the benefit of creditors and many claims have been filed against it by American citizens; can

the Custodian take possession of the property because the enemy has a *right* to the surplus remaining, *if any*, after the settlement of all claims of creditors?

Suppose further that the property held by a receiver or trustee in bankruptcy or an assignee for the benefit of creditors is that of an *American citizen*, but among the many claims filed is one by an enemy. Of course the Custodian will succeed to all rights in the claim filed by the enemy; but can he, because of such claim, take possession of the property?

In construing this statute the court should be reluctant to go beyond the expressed intention of the Congress and to interpret this Act as providing for a seizure of the property rights of American citizens, especially since the Act, if thus construed, should, at the same time, be held unconstitutional.

The point that depriving citizens of possessory rights would be unconstitutional, was brought to the attention of the Senate Committee in charge of this bill by counsel for the New York Stock Transfer Association, who submitted a memorandum suggesting the *possibility* that the Act as proposed did not safeguard a mortgagee, pledgee or lienor and stated: "We do not believe this is the intent of Congress, and we do not believe that it lies within the power of Congress to deprive a citizen of the United States of the possessory rights which he shall have at the time of the passage of this Act as an incident to his mortgage, pledge or lien." (Hearing before Sub-Committee on Commerce, U. S. Senate, 65th Congress, First Session on H. R. 4960, p. 59.) This intimation

did not affect the deliberations of the committee because it was assumed (and rightly) that the Act did not interfere in any way with such possessory rights.

We have argued above that the authority intended to be conferred upon the Custodian is such as is usually conferred upon a receiver. It has been held, however, that a receiver of an insolvent corporation is not entitled to take possession of the securities deposited with a State Superintendent of Insurance—which, like the securities now seized, constitute a trust fund.

Cooke v. *Warner*, 56 Conn., 234.
Matter of H. P. S. F. Association, 129 N. Y. 288.
Ruggles v. *Chapman*, 59 N. Y., 163.
People v. *Chapman*, 64 N. Y., 557.
Raymond v. *Security Trust & Insurance Co.*, 44 Misc. (N. Y.) 31.
Rickman v. *Rickman*, 180 Mich., 224.

B. Section 8-(a) of the Act was not intended to enlarge the description contained in Section 7-(c) of the property required to be transferred to the Custodian.

Section 7 (c)—as we have urged in Point I above—defines the property which may be seized by the Custodian.

Section 8 (a) covers an *entirely different subject.*

In considering this Section, we should not lose sight of the fact that it does not purport to relate in any way to property held *in trust*, but only to

property subject to a "mortgage, pledge or lien"; and further, that the contention of the Custodian that these are not trust funds is made as an essential preliminary to his claim that the trustees are lienors of a peculiar character and therefore —under a very strange construction of this section—affirmatively deprived of the right to continue to hold the libelled securities.

If, therefore, the Custodian should now concede, or this court should hold (as we have urged that it should in Point II above), that the libelled securities constitute a trust fund, it would become entirely unnecessary to consider the meaning of Section 8-(a) of the Act.

If, however, it can be argued by the Custodian that this property is not held in trust at all, and that the position of the trustee is that of a lienor, and further that Section 8-(a) of the Statute was intended affirmatively to protect some kinds of liens and to destroy all others, it may be necessary, in order that we may be sure to understand the meaning of that section, to go into its history.

As originally drafted this Section was numbered 8 without subdivisions and consisted of two paragraphs. The first paragraph provided for the disposal of property subject to a mortgage, pledge or lien under a form of summary procedure to be laid down by the Secretary of Commerce and provided further that notice to the Custodian should have the same force and effect as if served upon the enemy. The second paragraph provided that in contracts, which by their terms might be terminated upon notice, a notice served upon the Alien Property Custodian should have the same effect as if served upon the enemy personally.

The beginning of this Section as the bill was introduced in Congress reads as follows: (The brackets in the quoted matter and figures therein were not in the text of the bill, but are used by us to mark the points at which were inserted the amendments which are referred to below).

> "Sec. 8. That [1] any person, not an enemy, or ally of enemy, holding a mortgage, pledge, or lien on or other right in the nature of security in, property of an enemy, or ally of enemy, may [2] after default, dispose of such property, [3] under such rules and regulations and after such notice as the Secretary of Commerce, with the approval of the President, shall prescribe; and such notice shall have in all respects the same force and effect as if duly served upon the enemy, or ally of enemy, personally: * * *" (Page 13 of bill as printed, page 15 of bill as printed in Proceedings of Senate Committee, lines 16-24.)

Almost at the beginning of the hearings before the Senate Committee, Mr. Boston, representing the New York Stock Transfer Association, was heard and submitted a written memorandum suggesting several amendments to the bill, two of them relating to Section 8, as follows: On page 13, line 16, after the word "that" (i. e. at the place in the above quotation marked [1]) insert the words "notwithstanding anything in this Act contained," and in line 19 after the word "may" (i. e. at the place in the above quotation marked [2]) insert the words "continue to hold the same and".

(See Proceedings of Senate Committee, pages 59, 47, 52.)

Mr. Boston's reason for suggesting these amendments was his apprehension that Section 8

in the form proposed (containing the provision for the disposal of property under rules prescribed by the Secretary of Commerce) might be considered "to a certain extent in conflict with the provisions of Section (c)" and might permit the Custodian to seize pledged property. He stated, however, that he did not believe that it was "the intent of Congress * * * to deprive a citizen of the United States of the possessory rights which he shall have at the time of the passage of this Act as an incident to his mortgage, pledge or lien" and further that he did not believe that it was "within the power of Congress" to do so. It was not, therefore, to remove the "sense of uneasiness" on the part of lawyers that he urged his point, but "in order to make it clear to the man who sits back of the desk and wonders what is going to happen to him". (Proceedings of Senate Committee, page 59, also page 69). Some days later when Assistant Attorney General Warren, who advised the Committee, came to these amendments desired by Mr. Boston, he advised that they "do not affect the bill in any way," adding that he thought they were "desirable."

In other words, it was believed that, while there was no occasion to provide generally that security holders might "continue to hold" their securities, yet, since such a statement *might relieve the anxiety of business men and could not affect the bill in any way*, the amendments were desirable.

Mr. Warren then proposed that on page 19 of the bill, after the words "property" (i. e., at the place in the above quotation marked [3]) there be inserted the words "in accordance with the laws of the State." Commenting upon this suggestion, Mr. Warren said, "I think that would be

assumed, anyway, that you could not dispose of pledged property except in accordance with the laws of the State." (Proceedings of Senate Committee, 160.)

Thus, at this stage of the hearings, the beginning of this Section 8, with amendments recommended by the Assistant Attorney General and apparently acquiesced in by the Senate Committee read (new and amended matter in italics) as follows:

> "SEC. 8. (a) That, *notwithstanding any thing in this Act contained,* any person, not an enemy, or ally of enemy, holding a mortgage, pledge, or lien on or other right in the nature of security in, property of an enemy, or ally of enemy, may *continue to hold the same, and,* after default, dispose of such property, *in accordance with the laws of the State,* under such rules and regualtions and after such notice as the Secretary of Commerce, with the approval of the President, shall prescribe; and such notice shall have in all respects the same force and effect as if duly served upon the enemy, or ally of enemy, personally; * * *" (Page 13 of bill as printed, page 15 of bill as printed in Proceedings of Senate Committee, lines 16-24).

Obviously the clause "may continue to hold" as used above refers to every conceivable case of property of an enemy held by an American citizen as security.

Other amendments were then suggested and adopted, one at least relating to the second paragraph of this section of the bill (Proceedings of Senate Committee, page 160). At a subsequent session Mr. Warren stated that these amendments involved duplication and that he thought it entirely possible to combine the original Section

and these amendments "in one very concise provision" (page 185). He therefore recommended the striking out of Section 8 and the insertion of a redraft which he proposed, stating that it "*contains everything which was in the prior draft*, together with Senator Calder's amendments, but *simply rearranges it in more concise form*" (page 185). The redraft which was submitted is substantially (although not exactly) in the form adopted as Section 8 (a) of the Trading with the Enemy Act.

The beginning of Section 8 (a) of the bill *as enacted* is as follows (except that the brackets do not, of course, appear in the original Act, nor do the letters in parentheses within the brackets, the matter within the brackets being the amendments of the original draft and the letters referring to remarks upon these amendments below):

> "SEC. 8 (a) That [(a)] any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy [(b) which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand,] [(c) and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand,] may [(d) continue to hold] said property, and, after default, may dispose of the property [(e) in accordance with law] [(f) or may terminate or mature such contract by notice or presentation or demand served or made on the Alien Property Custodian in accordance with the law and the terms of such instrument or

> contract] and under such rules and regulations as [(g)] the President shall prescribe; 'and such notice and [(h) such presentation and demand] shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally.' "

Thus it appears that in the Act as passed (at the point marked [a] above) the words "notwithstanding anything in this Act contained" were stricken out as unnecessary and meaningless, Mr. Warren reverting, no doubt, to his opinion already expressed, which was, in substance, that there was no real reason for Mr. Boston's apprehension that this Section might be thought to contravene the provisions of Section 7 (e).

The amendment that a mortgagee, pledgee or lienor might dispose of property only "in accordance with law" was retained (at [e] above); and, since the disposal of such property could only take place in accordance with law, the scope of this section was cut down, naturally, to two purposes: the *notice to be given* in cases of liens and the notice to be given in cases of contracts *terminable upon notice*. A clause was therefore inserted (at [b] above) limiting *in express terms* the application of the section *in so far as it related to mortgages, liens, etc.*, to such mortgages, liens, etc., as *may be disposed of on notice*. Similarly a provision was inserted (at [c] above) limiting the application of the section, in so far as it related to *contracts*, to such contracts as may be *terminated on notice*. The section as originally proposed had provided for the *disposal* of property held subject to *mortgage, liens*, etc., and for the effect of a notice given; provisions were here inserted for the giving of notice and making of presentment and

demands in cases of *contracts* which may be terminated upon notice, etc. (at [f] above), and for the effect of such presentation and demand as well as notice (at [h] above). The provision that rules and regulations should be made by the *Secretary of Commerce* was omitted (at [g] above).

Although the Senate Committee had acquiesced in the *two* amendments proposed on behalf of the New York Stock Transfer Association to accomplish a specified result, one of these, the insertion of the words "notwithstanding anything in this Act contained" (at [a] above) was (as we have pointed out) omitted in the process of condensation. The other amendment, the insertion of the words "continue to hold said property and" (at [d] above), was retained, which is not to be wondered at, if the purpose (or rather *lack* of purpose) for which they were inserted originally, is kept in mind. Nevertheless the greatest stress was laid upon these words in the courts below by counsel for the Custodian because it is only by a very strained construction of these words that any warrant whatever can be found for the seizure of property held subject to a *mortgage or lien.* (There is, as we have urged already, no warrant whatever for seizing property which is the subject of a *trust.*)

The construction just referred to is based upon the argument that Section 8 (a) defines *all* the rights of mortgagors, lienors, etc.; that it relates only to that limited class of mortgages, pledges and liens which may be disposed of on notice; that therefore the phrase "continue to hold" *as used in that Section,* can only relate to such cases; and, in conclusion, that all other property subject to mortgages and liens which can *not* be disposed

of *no notice*—and for that very reason are not referred to at all in Section 8 (a)—may be seized by the Alien Property Custodian, in accordance with the maxim "*expressio unius exclusio alterius.*"

In considering what force should be given to these words "continue to hold" as they appear in said Section 8 (a) this court is urged to note:

(1) That the preceding Section 7 (c) is devoted to defining the property which may be seized and that in that Section there is nothing to warrant the seizure of property held as security.

(2) That the purpose of Section 8 (a) in which these words "continue to hold" occur is *to give relief* to those holders of security who are *bound to give notice*—providing in substance that the Custodian, as the representative of the enemy, may be served with such notice.

(3) That the words "continue to hold" should not be construed as if they were in fact a part of Section 7 (c)—even if we did not know exactly what was the intention of the Congress in inserting these words in the Act and the meaning which was attached to them. It is especially unfair to give a strained construction to these words since we know just how the words happened to be inserted in the Act and that they were *not* intended to have the force which the Custodian seeks to have attached to them in these cases.

(4) That the construction proposed by the Custodian would amount to an extreme, and entirely unreasonable discrimination in favor of one particular class of holders of security.

Referring to the reason marked (3) above, we urge that if the framers of the bill had intended

that the Alien Property Custodian should be authorized to seize (not only the interest of enemies in property owned or possessed by American citizens, but) all property in which enemies might have an interest, although owned by or held subject to a lien by American citizens (except in the *one case* of property which might be disposed of by the holder of the lien *upon notice*), it would have been a simple and natural thing to express that intention *in Section 7 (c)* accordingly. The fact that the words "continue to hold," which are the basis of the contention of the Custodian, were inserted instead *in Section 8 (a)* makes it necessary to limit their meaning to *cases which were the subject matter of that Section.*

If there is any force whatever in the contention made by the Custodian in the courts below, that the words "may continue to hold" enlarge or explain the meaning of the language used in that section which defines the property which may be taken (Section 7 (c)) it is lost when we find (as pointed out above) that these words were inserted as an amendment, that the man who proposed them asserted his belief that it was not the intention (or within the power) of Congress "to deprive a citizen of the United States of the possessory rights which he shall have at the time of the passage of the Acts" but who asked to have the words inserted only "in order to make it clear to the man who sits back of the desk" that interference with his possessory rights was not contemplated. This view must have been acquiesced in by the Committee and the amendments desired were inserted upon the advice of the Assistant Attorney General that they "do not affect the bill in any way." Certainly it was not considered for

a moment that by the addition of these words stock brokers, and possibly some others similarly situated, would be allowed to retain security which otherwise they would not have been permitted to hold; and just as certainly it was not supposed that, in reassuring the stock brokers by the insertion of these words, other citizens holding security would be deprived thereby of their right to retain such security.

This case is similar to that of a Statute which, among provisions making new law or amending the old law includes, in order to fully cover the subject, provisions which have long been established in the common law. The provisions last referred to are no doubt helpful to the "man back of the desk" who is not obliged to consult a lawyer in order to understand the subject; but it would hardly be contended that all provisions of the common law on the subject, which did not happen to be incorporated in the Statute, would be repealed because one or two provisions had been thus included *for convenience*.

It should be sufficient to dispose of the contention of the Custodian as to construction of this section to refer again to the report of the Senate Committee on Commerce to the Senate upon this bill. Of course it did not state that by the insertion of the words "may continue to hold" in Section 8 (a) the Act would protect one particular class of security holders, and at the same time deprive all others of their security! Instead, it pointed out only that it was a Section which provided for *the giving of notice to the Alien Property Custodian*, saying: "Section 8 (a) contains provisions by which American citizens holding security on enemy property may dispose of such

security on notice, presentation or demand served by him on the Alien Property Custodian, *with the same force and effect as if duly served upon the enemy personally. Similarly*, American citizens who have contracts with the enemy terminable upon notice or presentation or demand may terminate such contracts by such notice, presentation or demand served on the Alien Property Custodian" (Report page 8).

Referring now to the reason marked (4) above, one of the most convincing arguments against the construction of this Section of the Statute which was urged by the Custodian in the courts below is the discrimination which would result against all mortgagees, lienors, etc., *except one favored class;* and it is important to consider the entirely unreasonable lengths to which we would be carried by such a construction.

The vast amounts of collateral, held by banks and Trust Companies as security for loans, may, under the agreement of the parties, in case of default, be disposed of *without notice* (the usual words being, we believe, "with authority to sell the same on the non-performance of this promise, in such manner as they, in their discretion, may deem proper, *without notice*, etc.") Still further, property held subject to "ordinary mortgages" cannot be disposed of, we believe, merely "upon notice," but there must be more or less formal foreclosure proceedings. American citizens buy bonds secured by collateral deposited with trustees for the protection of such bond holders. If such bonds are not paid at maturity, the position of the trustee holding such collateral is the same as that of the trustees in this trust deed. If it

should be decided that because of the insertion of the words "may continue to hold" *in the Section providing for the giving of notice by liensors who may dispose of the property held by them on notice*, the rights of that class of liensors only are protected, then the vast amount of securities held by banks as collateral for loans and the securities held by them under collateral trust mortgages for the benefit of bond holders are subject to seizure by the Custodian?

In answer to our argument in the United States District Court that, under its decision in the Munich Insurance cases (Nos. 394 and 395 on the calendar for the October Term of this Court), securities held by banks as collateral with power to sell *without notice* might be seized by the Custodian although securities held by stock brokers which could *only* be sold *upon notice* could not be thus seized, that court in its opinion suggested that in cases where notice is not necessary a notice *might* nevertheless be given, and therefore, (in substance) that collateral which may be disposed of *without notice* may be retained by the pledgee, saying that "the greater includes the less" (Frankfort case, fol. 46, Allianz case, fol. 46). Probably the counsel for the Custodian (if he relies upon Section 8 (a) at all) will now adopt that view, rather than face the unreasonable harshness or rather absurdity, of a narrower construction.

Of course, if collateral may be held by a pledgee provided he may dispose of it upon giving notice, the same privilege *should* be given to one who may dispose of his collateral without notice. In that sense, "the greater includes the less." We should not overlook the fact, however, that the

whole argument in support of the claim that holders of collateral who may dispose of it "*on notice*" have rights superior to all other mortgagors and lienors is based upon the claim that since the one class of liens described as those which may be disposed of "on notice" are *expressly mentioned* in this Section, all other classes of liens must be excluded. In order to invoke this argument it is absolutely necessary to exclude all other known classes of liens, pledges and mortgages *which might have been* enumerated; *no known class can be included by implication.*

C. Even if the curious construction which has been suggested for Section 8-(a) should be adopted it does not require the transfer of these securities.

If it should be held by this Court, adopting the opinion in the United States District Court, that lieners who may dispose of the property held by them *without notice* cannot be deprived of their security by the Custodian, we should point out that in these very cases, as it happens, the trustees may dispose of the property in their hands (in order to pay claims properly established) without notice, and further that these trustees have the right to dispose of the trust funds without notice in order to compensate themselves for their services and to reimburse themselves for all expenses in connection with the administration of the trust.

POINT IV.

The facts upon which the Alien Property Custodian has concluded that the property sought to be seized belongs to the insurance company within the meaning of the act are all before this Court and undisputed and raise a question of law which should be passed upon by the Court.

In the courts below it was urged as forcibly as possible on behalf of the Custodian that under no circumstances could those courts inquire into, or pass upon, his right to take possession of the property provided only that it appeared that he had decided that the property desired was enemy property; and, further, that it would be quite time enough to go into questions as to the right of the holder of the property to retain it in his possession at some later date when those interested in the property, if they could be ascertained, should bring a proceeding or many proceedings under Section 9 of the Act.

A. If the Act relates to enemy property only, it will hardly be denied that the court should not direct the transfer of property which is not enemy property.

If this court should hold that the Act directs the transfer of enemy property only and that the Custodian cannot, therefore, rightfully take the property of citizens or neutrals, then it seems plain that the question whether or not the property sought to be taken is in fact and law enemy property is of the greatest importance and must

be decided in favor of the Custodian before a court will direct the delivery of such property to him. We believe, therefore, that the claim (which may be made by the Custodian in many forms) that the court cannot consider whether the property in question is enemy property or not involves always a repetition of the contention that those words in Section 7 (c) of the Act which define the property which may be taken as "owing or belonging to * * * an enemy" must be treated as having no meaning whatever. This contention has been discussed by us already (see Point I above); but we now add that, if the property sought to be taken is not enemy property, within the scope of the Act it is beyond the jurisdiction of the court which cannot, therefore, direct that it be transferred to the Custodian.

B. Even if the Act should be construed as relating to all property which the Custodian after investigation may determine to be enemy property, yet, when he asks the aid of the court, and it appears upon the undisputed facts that he is not entitled as a matter of law to the relief he seeks, such relief should be denied.

The Alien Property Custodian has "determined" that the property libeled herein *belongs to the Insurance Company* (not merely that the Insurance Company has certain "rights and claims" therein). The ownership of the property appears from the terms of a written instrument, the trust deed, which shows that the legal title to the property is vested in American citizens; that

they hold it *primarily* for the benefit of American policyholders and creditors and *secondarily* for the benefit of the Insurance Company (*Frankfort* case, fols. 97-119; *Allianz* case, fols. 93-119; Opinion of Judge Ward in the court below). Moreover, all the facts bearing upon the ownership of the property libeled which were considered by the Custodian are now before this Court and are undisputed (*Frankfort* case, fols. 76, 77; *Allianz* case, fols. 73, 74). The question whether this property (notwithstanding the "determination" of the Custodian) is *really* owned by an enemy is therefore one of law upon undisputed facts. The Alien Property Custodian has appealed to this court to enforce the law. If, *as a matter of law*, he is correct in his "determination," he is entitled as a matter of law to its possession; but, if it is *not* enemy property, he is not thus entitled, and this court will not grant its aid in the performance of an illegal act.

Section 7 (c), as originally enacted, directed the transfer to the Alien Property Custodian of enemy property which, after investigation, had been determined to be such; and the amendment of November 4, 1918, gave power to the Alien Property Custodian to seize such property. Counsel for the Custodian in the Circuit Court of Appeals referred to this amendment as "vesting in the Custodian the power of seizing property which had been determined * * * to belong * * * to an enemy" and having thus stated his view of the meaning of the Act, as amended, he argued that the Custodian might have seized the property in this case without applying to the court for assistance and, therefore, the court, when applied to, was bound to sanction such a seizure. Although,

assuming that it is possible to construe the statute as the Custodian has done and that the Act has given him the enormous "*power*" to seize not only enemy property but that of citizens and neutrals, it cannot be denied that Congress *never intended* that such power should be used to take possession of any property except that of enemies. In other words, *if* Congress has given such unprecedented power to the Custodian to be exercised by his agents, it has done so only because the Custodian was relied upon not to abuse this power and not to seize property which was not owned by an enemy. In such a case as this, therefore, where it was, to say the least, doubtful whether the property as a matter of law was enemy property under the Act, and where it was held by trustees, and considering what is probably the case that the Custodian had uniformly refrained from seizing property held by any kind of trustees other than trustees of insurance funds acting under statutes, it would seem that there was *only one proper course open to the Custodian, without relying upon his own opinion as to the law, to submit the question to a court for its decision.* That is exactly what he has done and the question which was clearly submitted to the District Court—which under the terms of the Act is authorized to issue only "such process as may be necessary and *proper*"—was whether the property which he would like to seize was in fact enemy property and might *lawfully* be taken into his possession.

That a court of law will review the conclusion of an administrative officer upon admitted facts, and that such an officer cannot confer jurisdiction upon himself by his mistake as to the law, is settled by the authorities.

In *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, Mr. Justice Peckham said (pp. 109-110):

> "The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual."

See also

Gonzales v. *Williams*, 192 U. S. 1.

The Custodian cannot override the Act of Congress, and this court will not aid him in an attempt to do so.

Burfenning v. *Chicago, St. Paul, etc., Railway*, 163 U. S. 321;
Waite v. *Macy*, 246 U. S. 606;
American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94 (cited above).

If it should be urged that the Congress had it within its power to enact that the "determination" of the Custodian should be conclusive upon all persons and upon all courts (except perhaps in proceedings brought under Section 9 of the Act), it should be a sufficient answer to point out that the *Congress made no such enactment*, as it

has done in other cases (see, for example, the Customs Administration Act and Contract Labor Law referred to in the cases of De Lema *v.* Bidwell, 182 U. S. 1, and Gonzales *v.* Williams, 192 U. S. 1); and that such power in an administrative officer will not be implied.

United States *v.* Sherman, 237 U. S. 146.

The amendment to Section 7 (c) providing in substance that the sole remedy of any person having a claim to any property transferred to the Custodian shall be that provided by the terms of the Act refers (as we have argued above) to relief sought affirmatively by some person in relation to property which has passed into the actual or constructive possession of the Custodian. It is similar to the requirement that a Receiver who has taken possession of property *shall be sued* only in the court which appointed him. If, however, the Receiver himself seeks affirmative relief, he must go into whatever court can grant it, which may involve the necessity of intervening in proceedings already begun. And the situation created by this amendment is not essentially different from that existing under our tax laws; since, although one who has paid over a tax can get relief only by proceeding in accordance with the statute, he may successfully resist the affirmative application of a collector to compel him to pay a tax which is not lawfully due.

Clinkenbeard *v.* U. S., 21 Wallace 65.

There is no reason to suppose that it was intended by the Trading with the Enemy Act to give the Alien Property Custodian the absolutely uncontrolled power to seize and hold property of

every kind whatsoever; and the statute provides expressly (Section 17) that "the district courts of the United States are hereby given jurisdiction to make and enter * * * all such orders and decrees * * * as may be necessary and proper in the premises to enforce the provisions of this Act." It would be a very narrow interpretation of the meaning of this Section to hold that it was enacted only for the benefit of the Custodian and that the court to which the enforcement of the Act has been confided cannot give any relief in cases of attempts to do unauthorized acts under the cover of an alleged "enforcement" of the statute. Moreover, as we have said above, when, as in these cases, *the Custodian himself comes into court* and asks to have the Act "enforced," the court is bound to refuse relief if proper grounds for enforcement are not shown; and this would seem to be beyond question when we note that, by express terms of the Act, a right of appeal from the decree of the trial court is provided, *not limiting that right exclusively to the Custodian.*

C. UNDER ANY VIEW THE TRUSTEES ARE ENTITLED TO THEIR DAY IN COURT BEFORE THEY CAN BE REQUIRED TO DELIVER THE PROPERTY FROM THEIR POSSESSION TO THE CUSTODIAN.

In the courts below the Custodian urged repeatedly that these proceedings were merely to enable him to take *possession* of the property and, therefore, that there was nothing for the court to do but to direct the Marshal to seize it and then to direct him to deliver the property thus seized to the Custodian—mere ministerial acts. But *pos-*

session by the Custodian *under the terms of the Act* means complete power of control and disposition (Act, Section 12, 4th paragraph), involving even the payment, out of the proceeds of the securities, pursuant to the direction of the President or the courts, of the claims of all debtors of the person "determined" to be an enemy (Act, Section 9), whether such debtors are entitled to the protection of the trust deed or not. Thus the transfer of *possession* to the Custodian involves the necessity of passing upon the rights to possession and other rights of the holder and others before the transfer of the property can properly be directed The propriety of recognizing the claims of those having possession of property in which the Custodian might claim an interest and of the assertion by the Custodian of the rights acquired by him from the enemy in the same manner as such rights would have to be asserted by the enemy himself *has been recognized from the outset*. The Executive Order of the President, dated November 12, 1918, issued pursuant to the authority conferred upon him by the Trading with the Enemy Act (and which was printed as an appendix by the Custodian to his brief in the court below) provides:

> (Paragraph 1.) "The Alien Property Custodian shall have the power and authority * * * to settle, compromise and adjust claims, demands and choses in action; to intervene in any suit or proceeding and to file and maintain claims, demands and suits of all kinds in or before any court, board, commission or other body * * *," and
>
> (Paragraph 2.) "Whenever any such property or any part or parcel thereof is or shall be subject to any claim or lien, charge or en-

> cumbrance, or is or shall be held or retained adversely to the Alien Property Custodian or to any requirement with respect to such property made by him, the Alien Property Custodian may compromise or settle controversy and pay any such claim in any way that he shall decide to be proper and as though he were the absolute owner of the property involved * * *."

In *Kahn* v. *Garvan*, 263 Fed. Rep. 909 (District Court, Southern District of New York, April 13, 1920), it appeared that the Custodian had demanded from an American trustee a fund held pursuant to a trust deed, which fund it was claimed should be distributed and paid over to him as the representative of the beneficiaries who were German citizens. The trustee filed a bill in the United States District Court for an accounting and the court approved of such a course as essential for the protection of the trustee, intimating that such a bill might have been brought in the State Court also. Judge Learned Hand noted the distinction between that case and the case at bar—that in the case before him the Custodian had determined that he was entitled to the *rights* of the beneficiaries as enemies and not to the trust fund itself, saying: "Had the Alien Property Custodian in this case demanded, as he most properly did not do, out of the hands of the plaintiff, the securities themselves, a question" would have arisen similar to that in the case at bar (p. 913). What, however, he said in reference to the bill in that case applies equally here as follows (pp. 912-913): "While it is not a bill by the Alien Property Custodian to enforce his rights under the Act, a judicial accounting is, as I said, a condition upon its orderly

execution, because without it the trustee cannot be compelled to distribute. I think it makes no difference, this being its substantial purpose, who is plaintiff or who is defendant." This case is referred to in order to show what we believe has been the usual practice of the Custodian in his attitude towards trust estates and to indicate what would have been the proper procedure here. If he was entitled to claim and wished to claim that the trust funds should be administered by him and not by the trustees he should have brought bills for an accounting, making parties thereto all persons interested in the trust estate—including perhaps the Superintendent of Insurance of the State of Massachusetts, pursuant to the laws of which State the trusts were established, and which State holds other funds deposited by these insurance companies to accomplish the same purpose.

We have spoken heretofore of the rights of American policyholders and creditors under the trust deeds; but the fact should not be overlooked that a trustee performs services for which he is entitled to receive compensation; that in the case of a trust company a large part of its business is the administration of trust estates; that in administering such estates a trustee incurs expenses; and, therefore, in those cases to take securities out of the hands of the trustees who hold them pursuant to a lawful contract and to place them in the hands of the Custodian without an accounting, is depriving the trustee of a substantial property right. Aside from rights of the trustees it might be said that if the Custodian were to take the trust funds *as a substituted trustee*, bound

to administer them under the terms of the trust deed, the property rights of policyholders and creditors would not be taken from them; but perhaps the clearest way of pointing out that the Custodian does in fact propose to take such property rights is to understand that in his hands the funds would be held *not pursuant to the terms of the trust deed* but pursuant to the terms of the Trading with the Enemy Act and such other Acts as may be passed on the same subject.

CONCLUSION.

The decrees entered below should be reversed and the Marshal for the Southern District of New York should be directed to restore the property proceeded against in these two causes to the possession of the plaintiff-in-error and plaintiffs-in-error in these causes respectively.

Respectfully submitted,
MILLER, KING, LANE & TRAFFORD,
Attorneys for Plaintiffs in Error.

PERRY D. TRAFFORD,
Counsel.

APPENDIX.

Material Parts of Cited Sections of the Trading with the Enemy Act in force when these proceedings were begun.

SECTION 6. That the President is authorized to appoint, prescribe the duties of, and fix the salary (not to exceed $5,000 per annum) of an official, to be known as the Alien Property Custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned or delivered to said custodian under the provisions of this Act; and to hold, administer and account for the same under the general direction of the President and as provided in this Act. The Alien Property Custodian shall give such bond or bonds, and in such form and amount, and with such security as the President shall prescribe. * * *

SECTION 7 (*e*). If the President shall so require any money or other property, including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy, or ally of enemy not holding a license granted by the President hereunder, which the President, after investigation shall determine is so owing or so belongs or is so held, shall be

conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered or recorded in any office for the filing, registering or recording of conveyances, transfers or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering or recording conveyances, transfers or assignments of patents, copyrights, trade-marks or any rights therein or any other rights); and if so filed, registered or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer or assignment to the Alien Property Custodian so filed, registered or recorded.

Whenever any such property shall consist of shares of stock, or other beneficial interest in any corporation, association or company or trust, it shall be the duty of the corporation, association, or company, or trustee, or trustees issuing such shares, or any certificates or other instruments, representing the same or any other beneficial interest, to cancel upon its, his or their books, all shares of stock or other beneficial interest standing upon its, his or their books, in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy, or ally of enemy, and which shall have

been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian, or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interests to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him, shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

(As amended November 4, 1918, 40 Stat. 1020.)

SECTION 8 (a). That any person not an enemy, or ally of enemy, holding a lawful mortgage, pledge or lien or other right in the nature of security in property of an enemy, or ally of enemy, which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy, or ally of enemy, who is a party to any lawful contract with an enemy, or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in ac-

cordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the Alien Property Custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy, or ally of enemy, personally; *Provided*, that no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required; *Provided, further*, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

SECTION 9. That any person not an enemy, or ally of enemy, claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him, or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property, or any part thereof, shall have been

conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property, and of all persons claiming any right, title or interest therein, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled; *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required, and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the District Court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title or debt so claimed, and a suit shall be so instituted, then the money or other

property of the enemy, or ally of enemy, against whom such interest, right or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit, otherwise terminated.

Except as herein provided, the money or other property converted, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

This section shall not apply, however, to money paid to the Alien Property Custodian under Section 10 hereof.

(This section was amended July 11, 1919, 41 Stat. 35, after these proceedings were begun.)

SECTION 12. That all moneys (including checks and drafts payable on demand) paid to or received by the Alien Property Custodian * * *

All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian hereunder shall be safely held and administered by him except as hereinafter provided: * * *

The Alien Property Custodian shall be vested with all of the powers of a common-law trustee in

respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: * * *

After the end of the war any claim of any enemy, or of an ally of enemy, to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct; *Provided however,* * * *

(Amendment of March 28, 1918, 40 Stat. 460.)

SECTION 17. That the district Courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections 128 and 238 of the Act of March 3d, 1911, entitled "An Act to codify, revise and amend the laws relating to the judiciary."

Nos. 335 and 336

In the Supreme Court of the United States

October Term, 1939

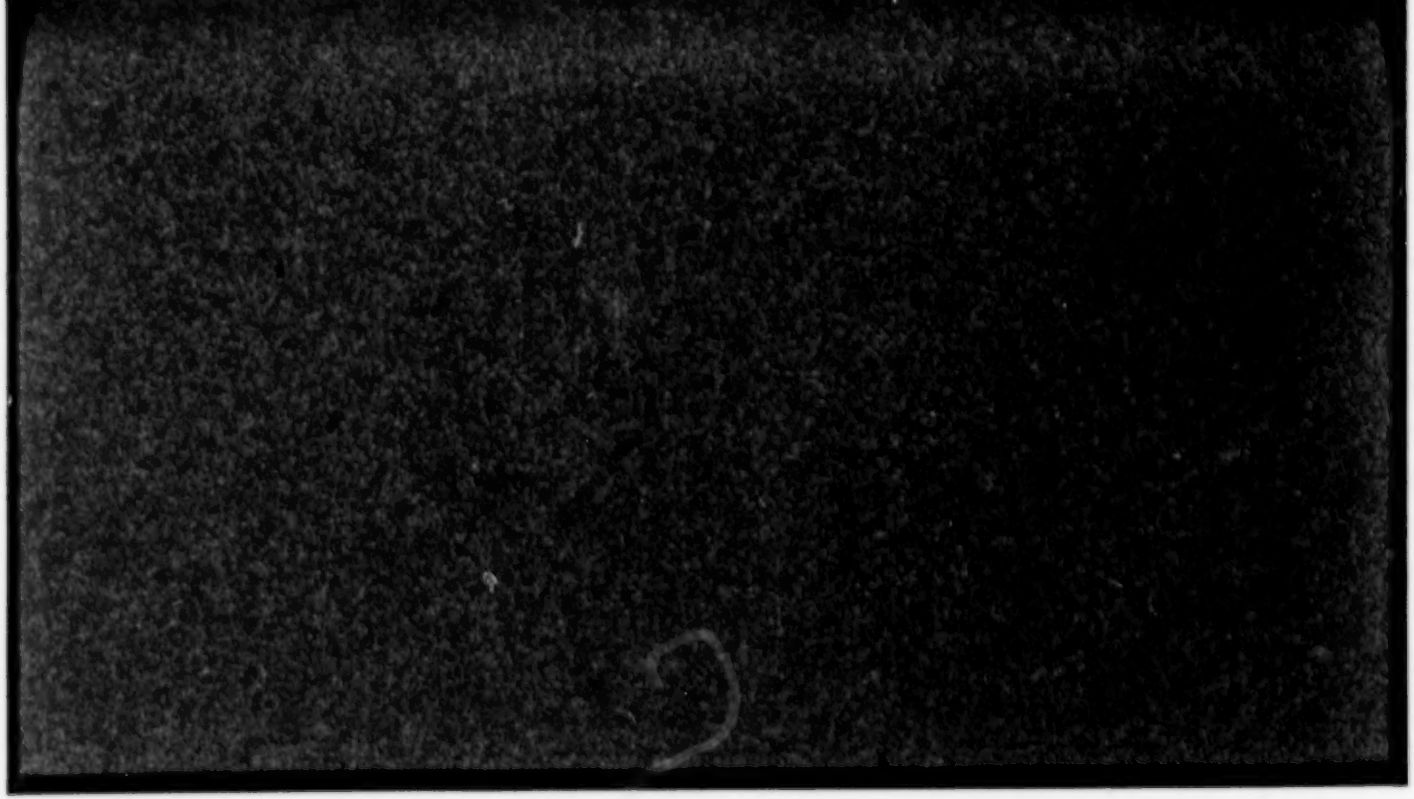
CENTRAL DIESEL [illegible]
INDUSTRIES, INC.,
Petitioner,
vs.
[illegible]

FRANCIS T. [illegible]
Respondent.

EDWIN S. [illegible]
VANDERBILT [illegible]
Plaintiffs-Petitioners,
vs.
[illegible]

PACIFIC [illegible]

[illegible]



In the Supreme Court of the United States.

OCTOBER TERM, 1920.

CENTRAL UNION TRUST COMPANY OF New York, individually and as trustee, etc., plaintiff in error,
against
FRANCIS P. GARVAN, AS ALIEN PROPERTY Custodian, defendant in error. } No. 392.

EDWIN G. MERRILL, JAMES SPEYER AND Frank A. Vanderlip, individually and as trustees, etc., plaintiffs in error,
against
FRANCIS P. GARVAN, AS ALIEN PROPERTY Custodian, defendant in error. } No. 393.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

By the writs of error in these cases the Central Union Trust Company of New York, individually and as trustee, and Edwin G. Merrill, James Speyer, and Frank A. Vanderlip, individually and as trustees, seek to review decrees of the United States Circuit

Court of Appeals for the Second Circuit affirming decrees of the District Court for the Southern District of New York, awarding to the Alien Property Custodian possession of certain securities. These securities had been libelled by the Alien Property Custodian in proceedings (analogous to admiralty suits in rem) brought under the provisions of section 17 of the Trading with the Enemy Act to enforce compliance with requirements or demands issued by the Alien Property Custodian under section 7 (c) of said act as amended.

The proceedings themselves, the pleadings of the custodian as libellant in the court below, and of the trustees as claimants, the decrees and opinions of the District Court and of the Circuit Court of Appeals, and the questions raised by the brief filed in this court by the plaintiff in error are all substantially identical with those in cases Nos. 394 and 395 (hereafter referred to as the "*Munich cases*"), and with those in case No. 396 (hereafter referred to as the "*Mannheim case*"), which will be heard cotemporaneously with these cases. Such differences as exist will be briefly discussed and shown to be immaterial.

The brief filed on behalf of the Alien Property Custodian in the Munich cases discusses the entire merits of the proposition at length, and the defendant in error hereby adopts his brief in said cases as his brief in the cases at bar, save in so far as is otherwise noted below. The custodian's brief in the *Mannheim case*, No. 396, will also be referred to and made

part of this brief to such extent as may seem appropriate.

The securities involved in case No. 392 were deposited with the plaintiff in error by the predecessors in interest of the Frankfort General Insurance Company, and said case will for convenience be hereafter referred to as the "*Frankfort case.*" Those involved in case No. 393 were deposited by the Allianz Insurance Company, and that case will be referred to hereafter as the "*Allianz case.*"

THE PLEADINGS.

The libels in both these cases save for unimportant details in verbiage are identical with those in the Munich cases.

THE ANSWER IN THE FRANKFORT CASE.

This answer, while considerably shorter than the answers in the *Munich cases*, is substantially the same. Like them it relies upon the provisions of the trust deed, under which the securities were delivered to the trustee, as evidencing the interest of itself, and the nonenemy creditors and policyholders in the trust funds. It avers that the deposit was made pursuant to statutes of Massachusetts instead of those of Connecticut relied upon in the *Munich cases*. Unlike the answers in the *Munich cases* it expressly claims a possessory lien upon the securities for the claimants' own commissions, compensation, and expenses as trustee. (Ans., par. 19, p. 16.) This difference is not material, for, if section 9 of the Trading with the Enemy Act is adequate protection for the creditors

and policyholders of the company, it also sufficiently protects the trustee.

This answer also avers that no proof has been furnished the trustee of the discharge of the outstanding obligations of the company to the satisfaction of the insurance commissioner of Massachusetts (par 16, p. 15). This difference is also of no moment, because the answers in the *Munich cases* asserted the existence of outstanding claims and obligations, the truth of which allegation, if material, would have been admitted by the custodian's motion for judgment on pleadings.

This answer contains one averment peculiar to this case—viz, the allegations of paragraph 13 (pp. 14, 15), to the effect that the risks written by the Frankfort Company were for the most part employers' liability policies, the company's liability thereunder not maturing until rendition of judgment against the policyholder by the injured employee; and that by reason of the character of these obligations it will not be possible within six months after the end of the war (the limit set by sec. 9 of the trading with the enemy act) for the company's policyholders to ascertain the amounts of their claims, make demand therefor, and proceed for recovery. This fact does not really alter the case. The right to institute claim proceedings under section 9 of the act is extended to all nonenemy persons "claiming any interest, right, or title in any money or other property." If, as the trustees contend, the securities here involved do con-

stitute a trust fund for the policyholders, it follows that such policyholders, even though their losses may not yet have accrued, have an equitable interest, right, or title in such fund, and as such would be entitled to apply for relief under section 9. A court of equity, where all section 9 suits must be brought, would then have power to set aside an amount sufficient to cover such claims and to decree a lien upon the trust fund therefor. Such a lien could not be constitutionally divested by any legislation Congress might hereafter enact under section 12 of the act.

It will be seen from a bare inspection that such allegations of the answers in the *Munich cases* as have no corresponding parts in the *Frankfort case*, if relevant at all, inure to the benefit of the trustee and not to that of the custodian. No useful purpose can therefore be served by pointing out or analyzing the differences between the Munich and Frankfort answers in this respect.

THE ANSWER IN THE ALLIANZ CASE.

This answer (pp. 10–16) is almost a verbatim copy of the answer in the *Frankfort case*, the only difference of any moment being the omission in paragraph 13 of the Allianz answer of any reference to the character of the policies and the alleged inability of the policyholders to present their claims under section 9. This allegation in the Frankfort answer, if relevant at all, is beneficial to the case of the trustee and not to that of the custodian. Hence it requires no further discussion under this caption.

THE DEEDS OF TRUST.

In so far as the deeds of trust in these two cases differ from the Munich deed such differences are in form rather than in substance. On page 67 of the custodian's brief in the *Munich case* is an analysis of the salient provisions of that deed of trust to which reference will be found convenient for this purpose.

THE FRANKFORT DEED.

Similar provisions for the benefit of the enemy insurance company will be noted as follows:

1. The trustees hold the property in trust for the company subject to compliance with the insurance laws of Massachusetts (par. 1).

2. The trustees are required to render account to the insurance company, and their statements and returns to the insurance commissioner of Massachusetts shall conform to the accounts rendered to the company (par. 2).

3. Power of investment and reinvestment is conditioned upon the consent of the company (par. 3).

4. Current interest and income is payable to the company (par. 3).

5. The company reserves the right to withdraw funds for making deposits in other States (par. 5).

6. The right is given to the company to fill vacancies in the trusteeship, and, without assigning cause, to remove trustees and to appoint their successors (pars. 7 and 8). Such power of appointment is subject to the approval of the Massachusetts insurance

commissioner, a slight additional protection for the policyholders not covered by the Munich deed.

7. After making due provision for satisfaction of policy liabilities and claims, the trustees stand possessed of the trust funds at the control and subject to the order of the company (par. 9).

8. Debts and liabilities of the company may be satisfied by the trustees only on consent of the company or pursuant to judgment of court (par. 4).

Thus all eight of the material provisions for the benefit of the company noted in our Munich brief are repeated here. In addition, in paragraph 6 of the Frankfort deed the company reserves specifically the right to withdraw capital in excess of the amount required by law to be maintained (viz, sec. 224 of the public statutes of Massachusetts, as quoted; transcript, p. 18)—a provision perhaps implied, but not expressed in the Munich deed.

THE ALLIANZ DEED.

This deed, while differing in phraseology, likewise contains these material provisions for the company's benefit with minor differences named below.

1. The initial declaration that the trustees stand seized of the property to the benefit of the company is qualified by a proviso that no portion of the funds may be returned to the company except upon certificate of the insurance commissioner stating that the sum returned is not needed for the purposes of the trust. This qualification merely declares the evidence upon which funds may be released and does not in any

way give the allianz company any weaker status than that possessed by the Munich company.

5. The company does not here reserve the right to withdraw funds for the purpose of making deposits in other States. However, such deposits in other States if made by the Munich Company would likewise stand under the laws of such States for the benefit of the creditors and policyholders, so that this difference is not material.

Unlike the Frankfort deed, there is here no expressed right on the part of the company to withdraw excess capital. Nor is such a provision contained in the Munich deed.

* * * * *

It is therefore apparent that the deeds of trust in these two cases are of similar scope and import to the Munich deeds, and a detailed discussion thereof need not be repeated here.

CASES CITED BY PLAINTIFFS IN ERROR.

There are a few decisions cited by our opponents which are not covered by our brief in the *Munich cases*, and these will be briefly discussed or referred to here, page reference being to the opposing brief unless otherwise indicated.

Gonzales v. *Williams*, 192 U. S. 1 (p. 59), is likewise referred to in our brief in the Mannheim case (No. 396), and is fully covered by our discussion of the *De Lima case*, 182 U. S. 1, in the brief last mentioned.

Raymond v. *Security Trust and Insurance Company*, 44 N. Y. Misc. 31, cited by our opponents (p. 41), to

show the superiority of the trustee's right of possession, is not in point. In the absence of an enabling statute, that case decided that the receiver of an insurance company could not take away from the superintendent of insurance a statutory deposit. Our discussion of the New York cases in the Munich brief fully analyzes and disposes of the merits of this case.

Even more inapplicable is the case of *Rickman* v. *Rickman*, 180 Mich. 224, cited by our opponents (p. 41) to maintain the same proposition. The case does not concern an insurance deposit nor the right of policyholders. The facts are quite complicated, but the decision must have been cited because of the court's finding that the receiver of an insolvent partnership is without power to deprive a subcontractor of a lien given him upon partnership property by statute.

Waite v. *Macy*, 246 U. S. 606 (opponent's brief, p. 59). In this case it was held that an importer of tea might enjoin the Board of Tea Appraisers from excluding tea from an arbitrary tax prescribed by the Secretary of the Treasury, but not sanctioned by statute. The injunction was granted on the basis that "no other remedy, if there is any other, will secure the plaintiff's right" (p. 610). Such is not the case here.

Claim of Marcuard, et al., The Confiscation Cases, 87 U. S., 114, was a confiscation proceeding under the act of 1862, and is fully covered by our discussion of Civil War cases in the Munich brief. The cardinal

point in these cases is that the Trading with the Enemy Act is not an act for the confiscation of property; and further that the Confiscation Acts did not provide a specific exclusive remedy which nonenemy claimants might pursue.

Taylor v. *Davis*, 110 U. S. 330 (opposing brief, p. 29), is cited merely for the purpose of defining the words "trust" and "trustee." It requires no comment here.

CONCLUSION.

For the reasons given in our brief in the *Munich Case*, the decree of the Circuit Court of Appeals here complained of was correct asd should be affirmed.

Respectfully submitted.

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